

*United States Court of Appeals*  
*for the*  
*District of Columbia Circuit*



**TRANSCRIPT OF  
RECORD**



FOR MR. JUSTICE VAN ORSDEL.

## TRANSCRIPT OF RECORD.

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Court of Appeals, District of Columbia

**APRIL TERM, 1910.**

No. 2150.

728

ACADEMY OF THE SACRED HEART OF MARY, A COR-  
PORATION, APPELLANT,

*vs.*

PHILADELPHIA, BALTIMORE AND WASHINGTON RAIL-  
ROAD COMPANY, A CORPORATION.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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**FILED APRIL 11, 1910.**



C. J.

# COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

**APRIL TERM, 1910.**

**No. 2150.**

ACADEMY OF THE SACRED HEART OF MARY, A CORPORATION, APPELLANT,

*v.s.*

PHILADELPHIA, BALTIMORE AND WASHINGTON RAIL-ROAD COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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# In the Court of Appeals of the District of Columbia.

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No. 2150.

ACADEMY OF THE SACRED HEART OF MARY, a Corporation, Appellant,  
vs.  
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,  
a Corporation.

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a Supreme Court of the District of Columbia.

At Law. No. 48913.

ACADEMY OF THE SACRED HEART OF MARY, a Corporation, Plaintiff,  
vs.  
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,  
a Corporation, Defendant.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed November 5, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48913

ACADEMY OF THE SACRED HEART OF MARY, a Corporation, Plaintiff,  
vs.  
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,  
a Corporation, Defendant.

The plaintiff, Academy of the Sacred Heart of Mary, a corporation organized under the laws of the United States, sues the defendant, Philadelphia, Baltimore and Washington Railroad Company,

a foreign corporation, having an office and doing business within the District of Columbia;

1. For that the plaintiff before and at the time of the committing of the grievances hereinafter mentioned was an incorporated association organized for the purpose of conducting a seminary for the instruction of children and young ladies, and as such owned and possessed and still does own and possess a certain tract of land containing to-wit 21226 square feet of ground situate and being in the City of Washington and District of Columbia at the northwest corner of Block 343 and having a frontage of 99.4 feet on that certain public reservation, highway or street formed by the converging of Maryland Avenue, Virginia Avenue, C Street and 8th Street,

2 southwest, which said tract of land according to the designation of streets in the District of Columbia is described as being on the southeast corner of 8th Street and C Street, southwest, and as fronting 99.4 feet on the south side of C Street, southwest, upon which said tract of land the plaintiff at and prior to the time of the committing of said grievances had caused to be erected a building to be used as a seminary for the instruction of children and young ladies and to be used as well as a boarding-house and as a residence or dwelling-house for those of its members as should act as superintendent, teachers and other attendants in and about the business of conducting said seminary and boarding-house, in which said building from the 5th day of November, A. D. 1903, and for a long time theretofore, the plaintiff has maintained and conducted, and still does maintain and conduct, in said building a boarding-house and a seminary for the instruction of children and young ladies and in which said building the members of the plaintiff association acting as superintendent, teachers and attendants in the conduct of the said seminary and boarding-house and the patrons of the said plaintiff's boarding-house lived and dwelt; and for that the defendant continuously from the said 5th day of November, A. D. 1903, and for a long time theretofore, has unlawfully and improperly erected and maintained, and still unlawfully and improperly maintains, a large number of railroad tracks, sidings and switches on that certain public reservation, highway or street formed by the converging of Maryland Avenue, Virginia Avenue, C Street and 8th Street, southwest, immediately in front

of said tract of land owned and possessed by the plaintiff

3 as aforesaid, and between 7th and 9th Streets, southwest; and for that the defendant during all the time aforesaid did improperly and unlawfully store or park freight cars and other cars in great number, to-wit, to the number of one hundred and upwards, on the said tracks, sidings and switches and suffer the same to remain there for an unreasonable length of time, frequently for the space of to-wit twenty-four hours, and did improperly and unlawfully during all the time aforesaid use the said tracks, sidings and switches as a place on which at all hours of the day and night by the use of locomotive engines propelled by steam to make up and break up freight trains and other trains, and did thereby unlawfully and improperly convert that said part of the public

reservation, highway or street, into a freight yard, and did during all that time aforesaid improperly and unlawfully at all hours of the day and night move and propel back and forth over and upon said tracks, sidings and switches a large number, to-wit, fifty locomotive steam engines, and did during all the time aforesaid improperly and unlawfully cause to be made and kept up in said locomotive steam engines large and injurious fires, and did cause to issue and proceed from said engines and to pass over and into plaintiff's said building and premises large quantities of offensive and unwholesome smoke, soot, steam, vapors and other gaseous substances arising from said fires and from said locomotive engines, and did during all the time aforesaid unlawfully and improperly cause, suffer and permit loud and disagreeable sounds and noises

on and about the said tracks, sidings and switches, including  
4 the rumbling and jarring of locomotive engines and freight

cars and other cars, and including the whistling of said engines and the escape of steam therefrom and the ringing of the bells thereof, and including the loud and boisterous shouting of the servants, agents and employees of the said defendant employed in and about the said tracks, sidings and switches and in and on and about the said locomotive engines and cars, and did during all the time aforesaid improperly and unlawfully suffer and permit disagreeable, offensive and noxious odors and smells to proceed from freight cars and other cars stored and parked and shifted back and forth over and upon the said tracks, sidings and switches, over and into plaintiff's said building and premises, and did during all the time aforesaid unlawfully and improperly use portions of the said public street, highway or reservation formed by the converging of said Maryland Avenue, Virginia Avenue, C Street and Eighth Street, southwest, between said 7th Street and 9th Street, southwest, as a place in which to unload freight, and did improperly and unlawfully constantly and frequently by the passage and re-passage of locomotive steam engines and cars, and by the standing thereof at and upon, over and across the pavements and side-walks of said 7th Street and 9th Street, southwest, and other streets, block up and close for long and unreasonable periods of time said 7th and 9th Street-, southwest, and other streets over which many of the persons living in plaintiff's said house as boarders and many of the scholars attending the plaintiff's seminary and the said superintendent, teachers and other attendants employed in conducting the

5 said seminary and boarding-house were obliged to pass and repass and accustomed to pass and repass in order to gain

access to and egress from said building of the plaintiff, by means and in consequence of all the aforesaid wrongful, injurious and improper, negligent and unlawful acts of the defendant, the said plaintiff from, to-wit, the 5th day of November, A. D., 1903, and for a long time theretofore has been molested, annoyed and disturbed, and still is molested, annoyed and disturbed in the use of its said building and premises as a seminary and boarding-house and particularly during the times when the sessions of the said seminary were held, and whereby the plaintiff's superintendent,

teachers and other attendants and the persons living in said building as boarders have during all of said time been annoyed and molested in their occupancy of the said house of the plaintiff as a dwelling as aforesaid, and whereby the said building of the plaintiff has been greatly jarred and injured and the plaster on the walls thereof cracked and loosened and caused to fall, necessitating repairs at great expense, and whereby also large quantities of offensive and unwholesome smoke, steam, soot, vapors, and other gaseous substances have during the period aforesaid by entering the windows and doors of the said building and spreading and diffusing themselves in, upon and throughout the same caused great and intolerable discomfort and inconvenience to the said plaintiff, its superintendent, teachers and attendants and to said boarders and to the scholars in attendance on the said seminary and has also greatly injured the furniture of the said building and the other belongings of the plaintiff in said building, and whereby also access to and egress from said land and building have been during the

period aforesaid rendered difficult and dangerous, thereby deterring and preventing many persons from attending the said seminary and thereby deterring and preventing many persons from patronizing plaintiff's boarding-house, and whereby and by reason of the several grievances complained of many persons who would otherwise have become scholars in the said seminary have been prevented from doing so, and many persons who have at divers times been in attendance on the sessions of the said seminary as scholars have ceased so to attend, so that the attendance of scholars in and upon the sessions of the said seminary has been during all of said time greatly diminished from what it would have been had the plaintiff been in the quiet and peaceable enjoyment of its said property; and whereby and by reason of the several grievances complained of many persons who would otherwise have become patrons of the plaintiff's boarding-house have been prevented from doing so, and many persons who have at divers times patronized the plaintiff's boarding-house have ceased to do so, so that the number of persons boarding in the said boarding-house of the plaintiff has been during all of said time greatly diminished from what it would have been had the plaintiff been in the quiet and peaceable enjoyment of its said property; and whereby because of the diminished attendance on its said seminary and the diminished patronage of its said boarding-house by reason of the several grievances complained of the plaintiff has been deprived of a large source of income which it would have enjoyed from the revenues derived from the conducting of its said seminary and school and boarding-house had it been in the quiet and peaceable possession of

its said property; and whereby also the value of the said property of the plaintiff during all of the period aforesaid was and still is greatly depreciated in value, and whereby the plaintiff has been prevented from having so beneficial an occupation thereof as it might and otherwise could and would have had, and whereby and by reason of the said several grievances complained of the plaintiff has been greatly damaged in the use of the said build-

ing as a seminary and boarding-house and dwelling and the same is now of little use or benefit to the plaintiff for the purposes for which it was intended; all to the special damage of the plaintiff in the sum of \$25,000, and it therefore brings this suit.

2. And the plaintiff sues the defendant for that the plaintiff on the 5th day of November, A. D. 1903, and for a long time theretofore was and hitherto has been and still is lawfully seized and possessed of a certain lot of land and school-house and boarding-house and residence situated and being on the southeast corner of 8th Street and C Street, southwest, in the City of Washington, District of Columbia, and for that the defendant during all of the said time has unlawfully and improperly maintained and used and still does unlawfully and improperly maintain and use a large number of railroad tracks, sidings and switches on that said certain public reservation, highway or street formed by the converging of Maryland Avenue, Virginia Avenue, C Street, and 8th Street, southwest, immediately in front of the said land and building owned and possessed by the plaintiff as aforesaid, and between 7th Street southwest, and 9th Street, southwest, and has thereby injured the said land and the said building, and has thereby prevented the plaintiff from 8 having so beneficial an occupation thereof as it might and otherwise could and would have had, to the special damage of the plaintiff in the sum of \$25,000, and therefore it brings this suit.

And the plaintiff claims the sum of \$25,000, damages, besides the costs of this suit.

BERRY & MINOR &  
HUGH B. ROWLAND,  
*Attorneys for Plaintiff.*

The defendant is to plead thereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

BERRY & MINOR &  
HUGH B. ROWLAND,  
*Attorneys for Plaintiff.*

*Pleas.*

Filed November 27, 1906.

\* \* \* \* \*

1. The defendant, The Philadelphia, Baltimore and Washington Railroad Company, for plea to the declaration of the plaintiff in the above entitled cause says that it is not guilty as therein alleged.

2. And for a further and second plea to said declaration said defendant says that the plaintiff at the time of the commission of the grievances therein complained of was not the owner of nor 9 in possession of the premises mentioned and described in said declaration as therein alleged.

MCKENNEY & FLANNERY,  
*Attorneys for the Defendant.*

*Joinder of Issue.*

Filed December 10, 1906.

\* \* \* \* \*

Now comes the Plaintiff and joins issue upon the defendant's  
pleas.

BERRY & MINOR,  
HUGH B. ROWLAND,  
*Attorneys for Plaintiff.*

*Memorandum.*

December 15, 1909.—Verdict for Defendant.

*Motion for New Trial.*

Filed December 18, 1909.

\* \* \* \* \*

Now comes the plaintiff in the above entitled cause, by its attorneys and moves the Court to set aside the verdict of the jury  
10 and grant a new trial and assigns the following grounds:

1. Because the verdict is contrary to the evidence.
2. Because the verdict is contrary to the weight of the evidence.
3. Because the Court committed errors in the admission of evidence.
4. Because the Court committed errors in the exclusion of evidence.
5. Because the verdict is contrary to the law and the instructions of the Court.

HENRY H. BOWMAN,  
WILSON & BARKSDALE,  
*Attorneys for Plaintiff.*

Messrs. McKenney &amp; Flannery, Attorneys for Defendant:

Please take notice that we will call the above motion to the attention of Mr. Justice Wright holding Circuit Court No. 1, on Friday, December 24, 1909, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

HENRY H. BOWMAN,  
WILSON & BARKSDALE,  
*Attorneys for Plaintiff.*

January 4, 1910.—Hearing on Motion for New Trial extended to January 14, 1910.

## Supreme Court of the District of Columbia.

FRIDAY, January 14, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

\* \* \* \* \*

Upon hearing the plaintiff's motion for a new trial, it is considered that the same be, and hereby is overruled, and judgment on verdict ordered.

Therefore it is considered that the plaintiff take nothing by its suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of its defense, to be taxed by the Clerk, and have execution thereof.

The plaintiff by its Attorneys notes an appeal in open Court to the Court of Appeals of the District of Columbia; and, upon motion, the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars (\$100.)

12

*Memoranda.*

February 2, 1910.—Appeal bond,—filed.

February 23, 1910.—Bill of Exceptions submitted to Court.

## Supreme Court of the District of Columbia.

TUESDAY, March 1, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

\* \* \* \* \*

Now comes here the plaintiff by its Attorneys and prays the Court to sign, seal and make part of the record, its bill of exceptions taken during the trial of this cause (heretofore submitted) now for then, which is accordingly done.

13

*Bill of Exceptions.*

Filed March 1, 1910.

## In the Supreme Court of the District of Columbia.

At Law. No. 48913.

THE ACADEMY OF THE SACRED HEART OF MARY, a Corporation,  
vs.  
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation.

At the trial of the above entitled cause on the 8th, 9th, 13th and 14th days of December, 1909, before Mr. Justice Wright and a jury, the plaintiff to maintain the issues on its part joined, offered certain documentary evidence as follows, to wit:

Articles of incorporation in the words and figures following:  
 "Academy of the Sacred Heart of Mary," D. C., Wash'n City.

Recorded August 22, 1870, 1:30 P. M.

*Acts of Incorporation No. 1, Folio 79.*

To all persons to whom these presents may come, Know Ye, That we Sister Louisa Hayden, Superioreess and Sister Columbia Dittoe, Mary Aquin Montgomery, Cecilia Dittoe, and Mary Bertrand Sheridan, of the Order of St. Dominick of the City of Washington, in the District of Columbia, have this Thirteenth day of August, in the year of our Lord one thousand Eight hundred and seventy under and by virtue of authority granted by an Act of Congress entitled "An Act to provide for the creation of Corporations in the District of Columbia, by general law;" Approved May 5, 1870, agreed to unite and enter into, and do by these presents unite and enter into and form by themselves a Body Corporate or politic, to

be known and designated under the name and style of the  
 14 "Academy of the Sacred Heart of Mary," of the City and

District aforesaid, under which name and style, they and their successors will devote themselves to the education and instruction of students or pupils in the various branches of study usually taught in all well-conducted and first class Academies or Seminaries of learning for females; and to the reception and care of all acceptable novices who may present themselves for admission into their order; and for the performance of all the duties and enjoyment of all rights and privileges usually performed and enjoyed by legally incorporated and chartered Academies.

Also to sue and be sued, implead and be impleaded, to received, hold and enjoy property, real, personal and mixed, and the same to receive and convey, by gift, grant, bargain, or otherwise, and to enjoy all the rights, privileges and protections granted and guaranteed by and under the provisions of the above recited Act of Congress.

And they further agree and bind themselves and their successors forever to respect and be governed by the rules, regulations and requirements prescribed by said Act of Congress.

In testimony whereof we have hereunto set our hands and seals, and affixed the common seal of our Academy, this Thirteenth day of August, A. D. One thousand eight hundred and seventy.

SISTER LOUISA HAYDEN, *Sup'r.* [SEAL.]

MARY LOUISA HAYDEN.

SISTER COLUMBIA, *Dittoe.*

[SEAL.]

SARAH COLUMBIA, *Dittoe.*

SISTER M. AQUIN MONTGOMERY. [SEAL.]

ESTHER A. MONTGOMERY.

SISTER CECILIA, *Dittoe.*

[SEAL.]

MARY OR DITTOE.

SISTER M. BERTRAND SHERIDAN. [SEAL.]

OR MARY SHERIDAN.

[Seal Academy of the Sacred — of Mary.]

Signed, sealed and delivered in the presence of—

E. J. KLOPFER,  
CHAS. C. CALLAN,  
*Witness-*

15 Which said articles of incorporation were duly acknowledged and were duly certified by the Deputy Recorder of Deeds for the District of Columbia.

A Deed in the following words and figures:—

*Deed in Fee Simple.*

Recorded August 25, 1870, 3 P. M.

James Fraser and wife  
to  
Louisa Hayden, Superioreess, etc.

Liber No. 622, Folio 279, et seq. Stamp \$22.50/100.

This indenture, made this twenty-fourth day of August in the year of our Lord one thousand eight hundred and seventy, between James Fraser and Salina Fraser, his wife, of the City and County of Washington, in the District of Columbia, parties of the first part, and Louisa Hayden, Superioreess of the Academy of the Sacred Heart of Mary, of the same place, party of the second: Witnesseth, That the said party of the first part, for and in consideration of the sum of Twenty-two thousand five hundred dollars (\$22,500) in lawful money of the United States, to them in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged have granted, bargained, sold, aliened, enfeoffed, released and conveyed, and do by these presents, grant, bargain, sell, alien, enfeoff, release and convey unto the said party of the second part her successors in office as Superioreess of said Academy and assigns forever. All that entire piece or parcel of ground situate, lying and being in the City of Washington, in the District of Columbia, and known and designated on the ground plan or map thereof as the Western Half of square numbered Four Hundred and thirty-four (No. 434) and bounded as follows:

Beginning for the same at the North-west corner of said square and running thence Eastwardly along the line of South 16 "C" street ninety-nine feet and eight inches (99 feet—8 in.); thence Southwardly two hundred and fourteen (214) feet to South "D" street; thence along the line of said South "D" Street Westwardly ninety-nine feet and eight inches (99 ft.—8 in.) to eighth street West; and thence along said eighth street west two hundred and fourteen (214) feet to the place of beginning. Together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise ap-

pertaining, and all the remainders, reversions, rents, issued and profits thereof, and all the estate, rights, title, interest, claim and demand whatsoever, whether at law or in equity of the said parties of the first part, of, in, to or out of the said piece of land and premises. To have and to hold the said piece of land and premises with the appurtenances, unto the said party of the second part, her successors in office, assigns, to her and their sole use, benefit and behoof forever. And the said James Fraser and Salina Fraser, his wife, for themselves, their heirs and executors and administrators do hereby covenant, promise and agree, to and with the said party of the second part, her successors in office and assigns, that they the said James Fraser and Salina Fraser, his wife, and their heirs, shall and will warrant and forever defend the said party of the second part her successors in office and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof, by, from, under or through them, and against any and all claim and demand whatsoever. And further that the said James Fraser and Salina Fraser, his wife, and their heirs, shall and will at any and all times hereafter upon the request and at the cost of the said party of the second part, her successors in office or assigns, make

and execute all such other deeds or other assurance in law,  
17 for the more sure and effectual conveyance of the said piece

or parcel of land *to* and premises and appurtenances, unto the said party of the second part, her successor in office or assigns, as the said party of the second part, her successor in office or assigns, or her or their counsel learned in the law shall advise, devise or require. In testimony whereof, the said parties of the first part, have hereunto set their hand- and seal- on the day and year first above written.

JAMES FRASER. [SEAL.]  
SALINA FRASER [SEAL.]

Signed, sealed and delivered in the presence of—having first been duly stamped

EDM. F. BROWN.  
CHAS. C. CALLEN.

The said deed was duly acknowledged and was duly certified by the said Deputy Recorder of Deeds.

A deed recorded July 24, 1875 in Liber No. 792, folio 231, in the following words and figures:

This i-denture made this twelfth day of July in the year of our Lord, One thousand eight hundred and seventy-five, between James Fraser, of the City of Washington in the District of Columbia, of the first part, and Louisa Hayden of the said City of Washington, formerly the Superioress of the Academy of the Sacred Heart of Mary, of the second part, and "Academy of the Sacred Heart of Mary," an incorporated institution, domiciled in the said District of Columbia, of the third part, witnesseth, that the said parties of the first and second parts, for and in consideration of the sum of five

dollars, lawful money of the United States, to them in hand paid by the said party of the third part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed and conveyed and do, by these presents, grant, bargain sell, alien, enfeoff and convey unto the said "The Academy of the Sacred Heart of Mary," its successors and assigns forever, all that certain piece or parcel of ground or real estate, situate and lying in the said 18 City of Washington and known and described as — being the Western half of Square numbered Four hundred and thirty-four (434) as the same is laid down on the public plan of the said City. The intention of this conveyance being to vest the title to said described premises in the said party of the third part and to cure and correct all the errors and defects in a former conveyance recorded in Liber No. 622, folio 279, &c. of the Land Records for Washington County in said District, wherein and whereby it was intended to convey the said described premises to the said party of the third part. Together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in any wise appertaining, and all the remainders, reversions, rents, issues and profits thereof, and all the right, title, interest and estate, legal, equitable and otherwise, of the said parties of the first and second parts, of, in and to the same.

To have and to hold the said piece or parcel of ground or real estate and premises and appurtenances unto the said "The Academy of the Sacred Heart of Mary," its successors and assigns, to its and their sole use, benefit and behoff forever.

In testimony whereof the said parties of the first and second parts have hereunto set their hands and seals on the day and year first hereinbefore written.

JAMES FRASER. [SEAL.]  
LOUISA HAYDEN. [SEAL.]  
*Former Spr.*

Signed, seal- and delivered in the presence of--

CHARLES WALTER.  
WM. H. WARD.

Which said deed was duly acknowledged.

19 Articles of incorporation recorded November 28, 1890, in Liber 5, folio 242 et seq. of the Acts of Incorporation of the District of Columbia in the following words and figures:

Know all men by these presents that the undersigned Susan Roche, Margaret Cochrane, Catharine Carey, Margaret Flanagan and Delia Kelly, all citizens of the United States and residents of the District of Columbia, known in the Religious order to which they belong, to wit: The Sisters of the Order of St. Dominic by the names respectfully of Sister M. Enrica, Sister M. Robert, Sister M. Patrick, Sister M. Ursula and Sister M. Agnellus being desirous of associating themselves together for religious and educational purposes and for

the purpose of establishing an institution of learning in the City of Washington, District of Columbia, for the education of young ladies in the higher branches of learning taught in first-class schools for young ladies, and for such purpose to become a body corporate under the General Incorporation Law in force in the District of Columbia, do hereby certify as follows:

First. The name of the Society or Institution of learning hereby formed or proposed to be formed is and shall be "The Academy of the Sacred Heart of Mary" in the District of Columbia, aforesaid, and by said name it shall be known in law.

Second. The Society or Institution of learning is intended to be organized in perpetuity and to have perpetual existence.

Third. The trustees or Directors of said Society or Institution of learning shall be five in number for the first year of its existence, and until the appointment or election and qualification of their successors,

20 above named Susan Roche, Margaret Cochrane, Catharine Carey, Margaret Flanagan and Delia Kelly, known in their religious order by the names respectively of Sister M. Enrica, Sister M. Robert, — Sister M. Agnellus.

Fourth. The particular business and objects of the said Society or Institution of learning are to give to young ladies the advantages of a first-class educational institution, and the particular branches of literature and science proposed to be taught are the following:

General Literature, Mathematics, Natural Science, History, Languages, and the ordinary branches of English, together with music and painting; also the advancement of the incorporators themselves in religion and charity.

Fifth. The said Society or Institution of learning is not to be of the rank of a College or University.

In testimony whereof, we have hereto set our hands and seals this 21st day of November, A. D., 1890.

SUSAN ROCHE, [SEAL.]  
(Sr. M. Enrica.)

MARGARET COCHRANE, [SEAL.]  
(Sr. M. Robert.)

CATHERINE CAREY, [SEAL.]  
(Sr. M. Patrick.)  
(Sr. M. Ursula.)

MARGARET FLANAGAN. [SEAL.]  
DELIA KELLY, [SEAL.]  
(Sr. M. Agnellus.)

Signed, sealed — in the presence of—  
M. J. COLBERT.

Said articles of incorporation were duly acknowledged.

21 Quitclaim deed duly acknowledged and recorded November 29, 1890, in Liber No. 1536, folio 328 et seq., in the following words and figures:

This Deed, Made this 28th day of November, A. D. 1890, between James Fraser and Harriet M. Fraser, his wife, of the District of Columbia, of the first part, and the Academy of the Sacred Heart of Mary, a body corporate, incorporated under the provisions of the General incorporation laws in force in the District of Columbia, of the second part,

Witnesseth, whereas the said parties of the first part by deed dated the 24th day of August, A. D. 1870, and recorded on the same day in Liber No. 622, folio 279, of the Land Records of the District of Columbia, conveyed the property hereinafter described to Louisa Hayden, Superioreess of the Academy of the Sacred Heart of Mary, intending thereby to vest the title to said property in said Academy of the Sacred Heart of Mary.

And whereas, by a certain other deed dated the 12th day of July, A. D. 1875, and recorded on the 24th day of July, A. D. 1875, in Liber No. 792, folio 231 of said Land Records, the said James Fraser and Louisa Hayden conveyed said property to said Academy of the Sacred Heart of Mary for the purpose of correcting the Deed first hereinbefore referred to and for the purpose of vesting in said Academy of the Sacred Heart of Mary, the title to said property.

And whereas, doubts having since arisen as to whether the certificate of incorporation of said Academy was properly executed according to the provisions of the Act of Congress authorizing such incorporation, so as to give the persons filing said certificate any status

as a corporation under the name in said certificate mentioned,

22 And whereas for the purpose of removing any doubts in the premises, the said Academy of the Sacred Heart of Mary has incorporated itself under the provisions of said Acts of Congress by the filing of a proper certificate in the office of the Recorder of Deeds in the District of Columbia on the 28th day of November, A. D. 1890.

And whereas, for the purpose of carrying into effect the intention of two several deeds from James Fraser, hereinbefore referred to, and of vesting in the party hereto of the second part whatever title may remain in him the said James Fraser by reason either of the defective execution of the said deeds or by reason of the improper execution of the certificate of incorporation recorded as aforesaid in Incorporation Book, page 79, in the office of the Recorder of Deeds, the said parties of the first part have agreed to execute these presents:

Now therefore this indenture witnesseth, that the said parties of the first part in consideration of the premises and the sum of One Dollar to them paid by the said The Academy of the Sacred Heart of Mary, at and before the sealing and delivery hereof, the receipt of which is hereby acknowledged, have bargained and sold, released, quit-claimed and conveyed and do hereby bargain and sell, release quit-claim and convey unto the said party of the second part, its successors and assigns, the land and premises situated in the District of Columbia, and known and distinguished as and being the Western One-half ( $\frac{1}{2}$ ) of Square numbered Four Hundred and

thirty-four (434), together with all the improvements, hereditaments and appurtenances to the same belonging or in any wise appertaining, and all the right, title, interest and claim either at law or in equity of the said parties of the first part in and to the same.

23 To have and to hold the said land and premises with the appurtenances unto and to the use of the said party of the second part, its successors and assigns.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

JAMES FRASER.

[SEAL.]

HARRIET M. FRASER.

[SEAL.]

Signed, sealed and delivered in the presence of:

WM. H. PYWELL.

Quit-claim deed duly acknowledged and recorded November 28, 1890 in Liber No. 1536, folio 330 et seq. in the following words and figures:

This deed, Made this 28th day of November, A. D., 1890, between Louisa Hayden, unmarried, of the County of Cook, State of Illinois, of the first part, and "The Academy of the Sacred Heart of Mary," a body corporate in the District of Columbia, of the second part, witnesseth that the said party of the first part in consideration of the sum of One Dollar to her paid by the party of the second part, at and before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, has granted, bargained, and sold, released, quit-claimed and conveyed, and doth hereby grant, bargain and sell, release, quit-claim and convey unto the said party of the second part, its successors and assigns the land and premises situated in the District of Columbia, known and distinguished as and being the West one-half ( $\frac{1}{2}$ ) of Square numbered Four hundred and Thirty-four (434), together with all the improvements, hereditaments and appurtenances thereto belonging, and all the right, title, interest and claim of the said party of the first part in and to the same.

24 To have and to hold said land and premises with the appurtenances unto and to the use of said party of the second part, its successors and assigns.

The object of this deed is to vest in the party hereto of the second part whatever title may have been vested in the said party of the first part by reason of a certain Deed recorded in Liber No. 622, folio 279, of the Land Records of the District of Columbia, and which title the said party of the first part attempted to convey to "The Academy of the Sacred Heart of Mary" by Deed recorded in Liber 792, folio, 231, of said Land Records, but which conveyance is believed to have been inoperative by reason of the improper incorporation of the said "Academy of the Sacred Heart of Mary," and the said party of the first part therefore executes this deed to convey whatever title may remain in her to the said party of the

second part which has reincorporated itself by the filing of a proper certificate in the office of the Recorder of Deeds for the District of Columbia.

In testimony whereof, the said party of the first part hath hereunto set her hand and seal this 28th day of November, A. D., 1890.

LOUISA HAYDEN. [SEAL.]

Signed, sealed and delivered in the presence of:—

GEO. KEARNEY.

All these papers were properly proven and admitted in evidence.

Thereupon FRANCIS R. WELLER, a witness for the plaintiff testified: That he is a civil engineer and has been for about 11 years, was employed five years in the engineering department of the District of Columbia and is familiar with the location of reservations

25 and streets from 7th to 9th Street and C Street in Southwest

Washington and is able to scale distances on the map representing location of Academy, street and railroad tracks during the period claimed in declaration. From the corner of the Academy to nearest rail of north bound track is 90 feet. It is 42 feet further to the farthest track on Virginia Avenue. It is 21 feet beyond that track to the track that runs to the station (passenger track). From the center of latter track to center of first siding is 19 feet and to the center of the second siding from the same point 32 feet. Eighth Street is 100 feet from building line to building line. It is 200 feet to 7th Street from the corner of the Academy of the Sacred Heart. It is approximately 285 feet from the Academy to that part of C Street north of the tracks.

Thereupon FRANK J. CULLEN a witness for the plaintiff testified: That he is a photographer and took two photographs of the Academy building November 30, 1909 which are true. The photographs were introduced in evidence.

Thereupon MILLARD F. THOMPSON a witness for plaintiff testified: That he is a physician,—has been such since May 1884 in Washington and resides at 484 Maryland Avenue, Southwest; that he is familiar with the location of reservation 113, bounded by 7th and 9th Streets and C Street and is familiar with the conditions at that point as to the use and occupation of that property by the defendant from November 5, 1903 to November 5, 1906; that he is connected with the South Washington Citizenz Association; was on the smoke committee and went to the railroads asking them to abate the smoke nuisance; that the smoke from the Southern engines came up there and those on the other roads that burned soft coal and make it almost impossible to see a house in that neighborhood at certain times. They would fill the house with smoke from the  
26 switching engines so that you could hardly stay in the house along that line, particularly where so many engines were stopping. If the wind was blowing from the north, it enveloped

the whole place and you could not keep your windows open. Whenever it blew from the northwest, north or northeast that smoke was carried over the property of the Academy of the Sacred Heart of Mary. The shifting engines used coke, but the other engines, especially those going up hill that had to go in and out, especially from the south, burned soft coal. Gases always accompanied the smoke. The property from 7th to 9th Street was used practically to house engines there, for the trains to go out. At midnight he had seen from three to five engines there blowing off steam and smoke at the same time, and if you would go past there you could hardly hear yourself talk because of the rattle and noise. It was almost intolerable. That would go on, sometimes, all night—not with five engines, but maybe with a couple of them there. He was through there four or five times from morning to morning, at midnight and in the daytime. The smoke nuisance and the blowing off of steam was terrible, and not to be described. These engines were directly in front of the Academy of the Sacred Heart of Mary—they always stood there and had no other place to stay, they had to stay there and wait for this last train to come out of the depot. The north tracks were occupied with cars nearly all the time. The cars were parked there on the siding. Trains were made up on these side tracks on Reservation #113 from the west. They would be driven in there, and have big stone on them, about four by six cube, and they would make that thumping noise in the yard. There was a certain shock to it. That happened all through the yard, principally at night. They did this bumping practically all through

the night. Stone, girders, coal and building material were  
27      on the cars. They unloaded coal and building material in general heavy material. Derricks were used and made a noise, in moving and when stopped, bumping and depositing the materials. Digging was going on at 7th and 9th Streets and you couldn't pass at all. There was a track at 8th Street which was a thoroughfare. He thinks this was in 1905 and '6 "and you had to watch out for your life there and see that you didn't get caught between the cars. You had to take your chances between bumps, even though they had gatemen and watchmen. It was impossible to control that traffic there." At 7th street you would stay from five to fifteen minutes in passing, especially in the morning when the children were going to school. Witness' residence is a square and a half from this place. The Academy is at 8th and C Streets. The unloading was going on night and day.

Upon cross-examination witness testified: That this congestion of travel at 7th and 9th streets was greater when the railroad began to make improvements, but occurred to a degree before that. For ten or fifteen years "we had to stand at 7th street and 9th street, before they contemplated any change." Sometimes they would hold you there for ten minutes—you could not get across unless you run under the cars or jumped over them. The engineers could not help it. The tracks were covered and they could not put the gates up. He is vice-president of the citizens' association. Sometimes he saw five Southern Railway engines, sometimes two and three standing

in front of the Academy, probably three, at 11 o'clock at night, moving to let a train go past and moving back again, keeping up steam all the time. They were waiting to go down to the 6th street depot and bring out trains. There was only one track leading from this vicinity to 6th street depot. The engines of all the roads coming from the South used this one track. The four tracks nearest the Academy were used for freight trains and through traffic.

28 Cannot tell exact time when tracks were placed on reservation 113, but it was in the latter part of this time (November 1903 to November 1906). The combination of noises in unloading and shifting engines and blowing off steam that was so bad. You could hear the shifting engines blowing off at 3 o'clock in the morning as well as 11 o'clock at night. Does not know who unloaded the coal, it was done by a regular crane on the track. The dropping of a joist or beam would make a severe sound. The shifting in connection with the freight station was done principally west of 9th street to 11th street, but the noise would come from the bumping. They would bump along these cars and st-ike one at 11th street and it would resound at this end—it would keep on bumping along the whole line. It would last a few seconds. It was between 9th and 10th streets, but could be heard farther away.

Thereupon JOSEPH B. BAILEY a witness on behalf of the plaintiff testified: That he has resided about twenty years at 413 6th street Southwest, and that he is engaged in real estate, pensions and patents business. He is familiar with conditions existing from November 5, 1903 to November 5, 1906, on the Philadelphia, Baltimore and Washington Railroad in front of and near said Academy. He passed the place once every day sometimes oftener. There was a great noise from cars, congestion on 7th street—often stopped there by the trains five to eight minutes. Sometimes has counted fifty or sixty wagons, horses, buggies and vehicles on each side of the track. He has seen the smoke there so dense from the engines that you couldn't see a house across the street. He saw such conditions daily within the period designated. All kinds of freight and passenger cars were in front of the Academy. Part of the place was used in transit and part as freight yard, stone, heavy beams,

29 iron, bricks, building material, and he thinks coal, were unloaded there in different ways. The unloading made noise.

There were freight and passenger cars and any number of locomotives. They made noises blowing off steam and smoke to such an extent that if two people were talking anywhere in the neighborhood, they could not hear each other. He has seen engines back down, connect with trains, has seen trains stalled there, heard them whistle for assistance time over again. The noise was almost unbearable. When the wind is from the north, northwest or northeast it will carry smoke and gases into the houses south of the tracks and injure carpets, walls, furniture and anything. The trains jarred the buildings.

Upon cross-examination the witness testified: That a great many railroad trains freight and passenger passed over these four main tracks. All the passenger trains from or to the south passed over

the single track on Maryland Avenue. Passenger trains going south on this single track were repeatedly stalled there as he supposed by the length and weight of the train and the curve at 6th street. The jarring, noises, smoke and cinders came from all these trains as well as shifting engines. He could not designate one from the other. He does not know exact date when spur tracks on reservation #113 were put in. The spur tracks did not extend across 7th street. There was a great deal of traffic on the railroad.

Thereupon JOHN P. SULLIVAN a witness for the plaintiff testified: That he has been a druggist at 7th and D Streets, Southwest, for more than thirteen years and for about a year, 1905, lived at 703 C Street, Southwest, facing this reservation. The defendant ran regular trains and put in side tracks on which trains loaded 30 with different kinds of material were run in,—large stone, iron girders and brick were unloaded with very much noise. It was a very severe noise that could be heard sometimes for a couple of blocks. The reservation was used as a sort of freight yard. There were locomotives usually blowing off steam, emitting smoke, heavy black or gray, sometimes in large quantities and if the wind was from northwest, north or northeast they would be carried in the direction of the Academy. Trains very often stopped and were stalled in front of the Academy or that immediate neighborhood. Quite a number of empty cars at times were on the different tracks, within half a block of the Academy almost any time day or night but he could not recall seeing any cars directly in front of there. He saw freight trains and parts of trains loaded and unloaded on the tracks from half a block to a block from the Academy. Frequently some of the trains or a few of the cars loaded with sheep, cattle, hogs, and sometimes poultry, were allowed to remain there from perhaps 15 minutes to an hour or two hours. Nearly always odors came from these cars. He noticed that this happened once or twice a week or oftener. Excursionists were also let off within about a block of the Academy and frequently became intoxicated. He has often seen garbage trains held up, sometimes, stalled right in front of the Academy. There was a curve and upgrade from 7th to 9th streets. The odors were very foul and disagreeable and were near enough to be carried to the Academy. There was a crane operated by an engine made quite an amount of noise and smoke.

Upon cross-examination witness testified: That there was 31 an upgrade between 7th and 9th streets going west and that frequently he has seen freight trains stalled there, coming along the main tracks on Virginia Avenue, and some of them had poultry and garbage cars. Excursionists were unloaded in the neighborhood of 9th and C streets, that he would not say positively he ever saw an excursion train unloaded between 7th and 9th streets.

Thereupon JOHN D. WRIGHT, a witness for the plaintiff testified: That he has lived at 496 Maryland Avenue, Southwest, for fifteen years, about a block and a half from reservation 113 and two blocks from the Academy. He is a retired merchant. He knows about

the operations of the railroads in the vicinity of the Academy. He passes there frequently, half a dozen times a day sometimes more. There were several tracks on the reservation. They were used for loading and unloading structural material for the different government buildings by means of a heavy crane operated by an engine. Frequently two, three or four engines at a time were on those sidings and tracks. Many cars were switched there and stored between 6th and 7th streets, about half a block from the Academy. Smoke and soot were almost unbearable around there almost continuously. The nuisance from smoke, soot and gases was something unbearable both day and night. He passed there as late as eleven or twelve at night, frequently. The Academy was affected by smoke, cinders and gases coming in through the open windows. The noise was considerable on reservation 113 nearly all the time during the unloading of the

large structural iron and in the unloading of the other iron,  
32 heavy stone and coal. The siding was pretty well filled up with cars of structural iron work, stone, coal and brick nearly all the time. Frequently trains were shifted in on the different places. Backing, starting, shifting, breaking trains and cutting loose and switching cars made considerable noises. Jarring and rumbling of trains caused considerable noise. Locomotive engines were used frequently. Has seen them standing, two or three, at a time on those sidings emitting steam and smoke. Steam is noise. The condition as to traffic on 7th street and 9th street was awfully bad. You could hardly pass by without having to stop from five to ten minutes, especially 7th street, that is about one hundred feet from the building line of the 7th street to the Academy. The regular trains going South in nearly every case as late as 11 o'clock at night, would have to have two engines to push them up that grade from 6th to 9th streets,—it was upgrade all the way to 9th street and the smoke, soot and cinders from those trains was something unbearable. He has seen these heavy Southern trains stalled in front of the Academy frequently. The noise that was given by the extra coal that was put on to get up extra steam and pull them out and up that grade—starting and pulling—well, you know how a stalled train is, and the kind of noise it makes. It is considerable. These freight trains were loaded with all kinds of material—building material, vegetables, and cattle. Has seen cattle trains stop there and observed odor coming from them. Knows there were garbage cars standing there, but cannot fix the dates. Excursionists were unloaded at 9th and Maryland Avenue. Saw them frequently during the afternoon.

33 Upon cross-examination witness testified: That the excursionists were unloaded right at the corner of 9th—west side of 9th street—between that and 10th street. Stalled freight trains caused obstruction and congestion of 7th street. Stalled trains on the regular tracks in front of the Academy caused a great deal of noise starting, rumbling and roaring. They were usually the big southern trains—Southern Railroad—Atlantic Coast Line and C. & O. used the Maryland Avenue track—only one for passenger trains to the Long Bridge. All freight trains passed over Virginia Avenue tracks. He has seen trains shifted frequently, nearly every day

between 6th and 9th street. A great deal of this noise, smoke and dust came from the movements of these trains along these tracks on Virginia and Maryland Avenues. He was not in the Academy between 1903 and 1906.

Thereupon BERNARD LEONARD a witness for the plaintiff testified: That he has been in the real estate business about 22 years and has his office at 522 4½ Street and was acquainted with the condition of the railroad traffic in front of the Academy of the Sacred Heart of Mary from November 5, 1903, to November 5, 1906. Was near Academy frequently and saw cars in front of Academy every time he passed. He saw them unloading, coal, heavy stone and iron. He saw engines moving cars, puffing and driving the cars. Sometimes the smoke was very dense, again very light gray smoke. If the wind blew from the Northwest it would certainly go over toward the Academy. The shifting cars made a bumping noise. Always impediment—at 7th street, had to stop there two to five minutes.

34 Upon cross-examination witness testified: That a great many freight and passenger trains passed along the main tracks, all of the trains getting in and out of the city towards the south, long freight trains obstructed 7th street to some extent and all caused noise, smoke, soot and cinders.

MICHAEL A. KELLY a witness on behalf of the plaintiff testified: That he lives at 624 D Street, and has lived in the vicinity about twenty years. During the period he saw freight cars stop in front of the Academy and unload material, stone and brick. There were some empty cars there for a few days right in front of Sisters' Convent. Saw some long trains right in front of Academy a dozen times a day, loaded with stone, iron beams and building material. He noticed trains loaded with cattle and hogs right in front of Academy from which very offensive odors came. Shifting engines made smoke and cinders and the wind from north or west blew it right on the Academy. He saw iron beams and heavy stone unloaded. He observed noise—sometimes a terrific noise.

Upon cross-examination witness testified: That unloading of passengers was west of 9th street. Saw wrecking engine in front of the Academy on several occasions at least four or five times before it was moved but he did not see any steam in it. The loading and unloading was done in the reservation yard at 8th street. All the trains passed there and made noise, smoke and dust, whenever there were two engines to pull them up that grade they made more noise, smoke and dust.

35 Thereupon ROBERT O'NEILL, a witness for the plaintiff testified: That he lives at 479 F Street, Southwest, and is a retired builder. He has been acquainted with the building and premises of the Academy of the Sacred Heart of Mary since 1876, when he built the new wing, west wing, which is about 36 x 80 or 85 feet, and is three stories with a basement. The first floor is

for school purposes, next a chapel and third for sleeping rooms. The old building, first and second stories, is used for school purposes. He has frequently had to do odd jobs back and forth for the Sisters and does so yet.

"Q. Are you now familiar, from your experience as a builder, with the value of buildings?"

"A. Yes."

"Q. I will ask you to state whether or not you are familiar with the value of this building?"

"A. I guess I am. I belong to a building association and I am one of the appraisers and have to go out once a month. \* \* \*

"Q. From your experience as a builder, what in your opinion is the structural value of the building of the Sacred Heart of Mary?"

To which last question counsel for defendant objected, whereupon the following occurred:

The COURT: What in your judgment is the measure of damages in such a case as this? It is not depreciation of the permanent value of the building, is it?

Mr. WILSON: Oh, no; we do not claim for anything except for the inconvenience and the nuisance for the time being; that is all. To put it briefly, it is the nuisance for the time being, for the period for which we claim.

36 The COURT: You may show the depreciation of the value of the building for rental value. I know none of these cases where the value of the real estate has been an element for consideration by the jury.

Mr. WILSON: I do not think Mr. O'Neill is competent on the question of rental value. I have not qualified him at all as to that.

The COURT: You have not presented him on that. I take it from the opening statement that there is no claim for permanent depreciation in value.

Mr. WILSON: I take it under our declaration we could not recover for that, and this was not for the purpose of getting any damages for the permanent depreciation of the building, but it is rather to show the character of the building, to the comfortable use and enjoyment of which these sisters were entitled.

The COURT: Objection sustained.

To which action counsel then and there noted this their first exception, which was noted by the Court on its minutes.

Witness further testified that the operation of the railroads caused some of the ceiling to fall and he got a plasterer, another time a part of the ceiling fell again. He put up two of the ceilings with weather boarding or with tongue and grooved stuff. Witness and his man used to hang the windows on the front. They would not keep the windows open long. The dust and filth used to come in there so they had to let the window down. It was a hard time to stand it themselves. When they were hanging the windows.

37 When the wind blew from either the west or north they "got the benefit." He noticed this at any time he was called on when a window broke or a cord broke or any other job in the building. This might be once in three months, in six months, or

twelve months. The windows never could be opened on that side while this construction was going on. When the cars would bump together it would shake the whole building and there was in fact three or four small donkey engines. Work there all the time. Then the cars backed in and made up the train. Sometimes naturally, when they would let them go, these bumped up against each other. He was even there sometimes and a couple of times a day and at any time "Sometime walk along there, and if the wind was blowing any way brisk at all, you could not see across the street." Reservation 113 was made a dumping ground for cement, stone, brick, coal, and they backed cars in with garbage that was so offensive that witness could not stand the smell of it, and they would lay there, maybe, for hours at a time. The noise was immense, for there was all kinds of dumping. They did not spare any noise "nor spare nothing while they were going on with this work, in the way of noise or in the ways of dumping every thing." He even tried to cross 7th or 9th street and had to go in between the cars to get through. People with wagons had to wait until the train was split up, or back or went in front.

Upon cross-examination witness testified: The noise was great while the work of making railroad improvements was going on and his testimony in reference to the operation of engines, the dumping of material and noise, smoke and dust, was about that period, but before that was smoke. He could not say what time the improvements started. Prior to the improvements the noise and smoke and dust came from the passing of trains on the many tracks. There were many tracks on the reservation, but he never counted them.

There were seven or eight lines of cars there sometimes,  
38 so there must have been that many tracks. The tracks

were all spread from one side of the street to the other. He knows that this noise was in front of the windows. He knows the dust and noise came from the cars that passed up and down, and there was a large mixer that mixed cement and concrete, right in front of the Sisters. The mixer was used in connection with the improvements. Does not know whether the improvements started before December 1, 1906. The railroads always dump the darkies for the excursions at about 9th Street. They dumped everything down there in South Washington.

Upon re-direct-examination the following question was asked the witness.

"Q. Mr. O'Neill, how much of what you have testified to here occurred between November 5, 1903, and November 5, 1906?"

To which counsel for the defendant stated:

"I object to that, it is the cross-examination of his own witness. Witness has testified as well as he could."

The COURT: I do not think it is proper re-direct.

The objection is sustained.

"Q. Mr. O'Neill, did you notice those things between the periods or within the period that I have stated?"

Mr. FLANNERY: I object to that question as being cross-examination in another form.

The COURT: Your time for identifying the things that he related was in the direct-examination.

Mr. WILSON: I take it that you sustain the objection?

The COURT: Yes.

To which action of the court counsel for plaintiff then and there reserved this their second exception which was duly noted by the Court on its minutes.

Thereupon MARUICE FITZGERALD, a witness for the — testified:

39 That he has resided about nine years at 508 6th Street, Southwest, and in that section of the City for forty years, and he has been a real estate agent for about sixteen years and before that he was a grocer and provision dealer and contractor. He was a street and sewer contractor and worked for both the National and District Governments. He has been familiar with the property of the Academy of the *Academy of the Sacred Heart of Mary* for forty years. He knows that the Sisters have been in possession of the property twenty-five or thirty years. He is familiar with the conditions which exist- from November 5, 1903, to November 5, 1906, on reservation 113, as far as the same related to railroad traffic. The Railroad Construction Company kept the reservation and it was used for material being dumped and the manufacture of materials, concrete, and used for excavation work continually from the time of its commencement until of its completion. Has recollection that this was within the period named. The sidings of the reservation was used for many purposes. Used for reconstruction of the road and regular traffic. He saw cars there all the time. They extended from 7th to 9th street. Those are very two short squares and with the engine resting on the west line of 7th street, it was no more than about one hundred feet from the Academy. These two squares are not more than two hundred feet each. The cars were always piled up there. They seemed to be furnishing material as well as the freight cars, time and again, loading and unloading. Sometimes they unloaded by hand and when there was heavy material they unloaded by derricks. There were continual noises, such as dumping of heavy iron, and the bustle and racket that is made with shifting and shunting of cars and engines laying on the track there, blowing off steam, sometimes two or three engines at a time.

40 There was volumes of smoke continually emanating from engines. At times there would be heavy freight trains remain for a long time, and in starting these heavy trains It would go puff, puff, puff and a continual belching of a volumes of smoke. This was between 7th and 8th Streets on the main tracks. They were loaded with freight of all kinds: Gravel, Lumber, fruit cars, general merchandise. Sometimes standing still waiting there. Offensive odors were connected with gas and smoke and from cattle cars standing there with hogs and steers and poultry. He was immediately in front of the Academy passing it almost daily. All the smoke and steam emanating from these engines as they lay on the tracks blew directly against the Academy. When the wind

blew from the east or north all the smoke emanating from the engines on the tracks blew directly in that direction. The square is only about two hundred feet. When the engines were west of 8th street or to 9th street they were not much more than one hundred feet or one hundred and fifty feet from the Academy. In either direction between 7th and 9th streets wherever these engines were parked or any other machinery they had from which smoke emanated, it blew directly against the Academy, when the wind blew from either direction. The only chance they had to escape all these nuisances was when the wind blew from the south. Traffic was obstructed both on 7th and on 9th streets within the period.

Upon Cross-examination witness testified: That he did not observe the block signal tower at 9th street and Maryland Avenue. A great many passenger trains passed along the main running tracks on Maryland and Virginia Avenues between 7th and 9th streets, and as the city grew and the business increased the number of these increased, but were almost invariably found the engines in the neighborhood or 7th street, between 7th and 8th streets. A great

41 many trains and engines, freight and passenger, passed along these tracks. Constantly through the day and they made a great deal of noise and smoke and dust. He did not see a concrete mixer around there previous to the improvements. He remembers when 7th and 9th streets were closed and 8th street opened, but cannot say about the date, but is under the impression that it was a considerable time before the work of the railroad improvements began there. The construction work was — addition to the general traffic.

Thereupon Sister MARY PHILIP SWEANY, a witness for the plaintiff, testified: That she is connected with the Academy of the Sacred Heart of Mary as a teacher and that she was a resident at the Academy between November 5, 1903, and November 5, 1906, continually. She observed the condition in front of and near the Academy during that period, with respect to the operation of the railroad. She observed the shifting of trains, the shunting of engines and cars making up trains at different times of day, sometimes in the forenoon, sometimes in the afternoon. It would occur within an hour or two hours' time. She noticed smoke very clearly. She experienced the heavy smoke coming into the school-room. She was prefect of the study hall during part of that period, and at times when she had to hear recitations, a few feet from her desk, there was one window about twelve feet to the west of the desk which she never opened, because of the noise and the dust. In the warm weather she never opened that window. Frequently when she was hearing recitations she went down along that side of the room and lowered the windows to prevent the heavy cloud of black smoke from coming into the room, and when she gave a signal the pupils would lower the windows. During the warm  
42 weather they opened the windows, but frequently had to close them when the heavy smoke came and when very serious noises came. Sometimes she observed the smoke com-

ing from the engines in front of the Academy. She observed smoke coming from them into the Academy. Not always regularly, certain winds would bring it into the Academy very forcibly. They were troubled at night with the smoke, sometimes they even closed their windows at night until the rest of the smoke had passed away or had fallen. The closing of the windows did not exclude all of the smoke as was very apparent from their furniture and their open pianos. The pianos were open all day long for practice and lessons and they suffered. The furniture could be dusted several times a day and would not be over-dusted, and in the handling of books, if they went to get a few volumes from the library that had not been changed for a time and took them to the school room their fingers would be covered with black dust as from articles exposed to soot. They had to wash their hands before they could go on with their recitations, and the same was true of books which were taken from the study hall to the library cases and the same through the building with other articles that were handled. Those conditions existed during the entire period between 1903 and 1906. They were continuing and becoming worse. She taught continuously during the school term. Because of the noise, principally and partly because of the smoke, she never opened the window at her right while in the study hall. It would be almost impossible for her to hear recitations had she kept that window open in the summer season. Sometimes on the east side she had to close the windows. There were all kinds of noises that would come from the smoke stacks. All kinds of noises that could be made with steam were made there. She saw engines going back and forth. Empty cars going back and forth. There were five tracks before

43 their door. Very frequently and very noticeably there were cars standing in front of the Academy. Cattle cars stayed there many, many mornings when they were taking their breakfast. The refectory was then on about the level with the surface cars. Cattle cars stood there through their breakfast time. That occurred frequently. Bellowing noises came from the cars. The engines in front of the Academy building were both at rest and in motion. Sometimes engines were separate from trains, sometimes they were connected with trains, and they moved from track to track. They moved along to back on another track. Usually smoke was coming from them. The steam made all kinds of noises, hissing, seething, she cannot describe them, they were very nerve-racking, especially when hearing recitations, sometimes recitations were stopped, even three times within a half an hour, until the worst of the noise would pass away, then they would resume them again, but there still was noise. With the younger children that had a very bad effect; with the young ladies not so much, it took their attention and it was very difficult to hold the attention of the younger pupils through these interruptions. The time was lost. Each separate interruption lasted for a few minutes, enough for the pupils to get their attention away from the text. These interruptions to recitations happened week in and week out, month in and month out, each of the school days of the week. The school

days were from Monday morning until Friday evening. The commencement exercises within this period were all held in the hall, distance of about four squares from the Academy, because of the noise and smoke. The north end of the Academy building would be the stage where the pupils had to give their exercises, and where the priests or professor would have to address the graduates;

and twice within her experience in teaching in the Academy  
44 the faculty had decided to have the commencement in the

Academy hall. It would be much better for the pupils, more agreeable for the Sisters, and more appropriate to have the Academy commencement in the Academy hall, to receive guests there and to give them the entertainment had for them, but it had to be abandoned twice within that time. In both cases because the faculty decided that speaking or elocution could not be heard because of the noise. The commencement occurred in June, when the windows had to be opened and the noise from the passing and the standing trains, more from the standing than the passing trains, because the passing trains passed rapidly and the standing trains and engines would make a noise all the time they stood there and make a noise in starting again—these terrific noises, puffing and she did not know how to describe them, and the exercises could not be heard nor could a priest be invited to address the graduates, because he could not be heard. There is a chapel connected with the Academy building in which exercises were held twice daily. The chapel exercises began early, but so did the noises. The early morning exercises was interupted. It is customary to read the points of meditation for the assembled community at this time. They seldom could be heard when within a few feet of the reader. There were Sisters in the chapel, in the other part of the chapel—the room being about 60 feet long—who never heard the meditation read. That occurred early in the morning when they should enjoy the quiet and peace of the early morning. When they were offering mass at the altar, the officiating priest often could not hear the server when she answered the responses and even the server could not hear the priest when he terminated a prayer which should

be responded to. The school day began at 9 o'clock.

45 "The religious exercises are a great part of our lives." These interruptions were continuous. There was occasionally an hour that was passably quiet, but they were rare. The school closed at three o'clock. The principal meal was at five and it is customary in the convent to have a reader read for the community while they are partaking of this meal, and she seldom, if ever, read without interruptions, many interruptions during the time of the community partaking of their meal. Then there was a short recreation. After dinner hour and short recreation the chapel exercises began again, but the interruptions were just as frequent as they were in the morning and sometimes more so. They had to close down the windows in the summer, because the smoke was so bad and "did not exclude all the dust or the smoke." When she first came to the Academy she thought she could not sleep at all, because of those noises and interruptions. She did not know how she could stand it.

When she could get a light sleep and wake from it, the noises were still going on. It has the effect of making her restless and she did not enjoy refreshing sleep which she needed very much, especially during the time of her school work. When patrons or friends called at the Academy, seldom could the conversation be continued without interruption. She observed very heavy building material brought on reservation 113, large rocks, bricks and coal, heavy beams, iron for use in building. Cannot say how frequently such materials were unloaded or placed there, but it went on for more than a year, and they seemed to be very busy there all the time about it. When the material was unloaded from the cars it was unloaded principally with a derrick that worked with an engine and necessitated two engines standing there during that time. The

Sisters feel that these conditions seriously injured the Academy.  
46 They have not been able to advertise their school.

The Academy has always been equip-ed with good teachers. Other equipments they cannot have. They did not have proper class rooms because they were unsettled and they could not tell what was going to develop. Conditions were growing worse so they could not expand and fit their Academy as they would do and ad-vertise it. Pupils have left the Academy and gone to more fashion-able schools, not because they could not be taught there, but because they did — consider the surroundings as respectable as they would wish. In retaining such patronage as they have in these con-ditions they have had many pupils at reduced rates. During the period mentioned, *that* had much difficulty arising because of the obstruction of traffic across 7th street and 9th street with respect to their pupils going to school and coming from school. They have not had as much patronage north of the rialroad tracks. The major-ity of the pupils are from south, who can reach the Academy with-out crossing the tracks. She has known it to occur that pupils living north of the railroad tracks discontinued attendance upon the Academy because of railroad conditions, but could not recall that it occurred during the period covered by the suit. She belongs to the Dominican Order, as do all the Sisters at the Academy. The Order was at the Academy when the certificate of incorporation of 1890 was filed. She was not at the Academy in 1870. They knew that the Sisters at that time belonged to the same Order. It is within her personal knowledge.

Upon cross-examination the witness testified: During the period a great many trains, passenger and freight, and engines without trains attached, passed over these main tracks between 7th and 9th streets, in front of the Academy. Those trains gave their

47 share of noises, dust and smoke and soot which from time to time entered the windows of the Academy, but they ex-perienced most from the engines *and* standing and the shifting and shunting and the knocking together. Long freight trains, prin-cipally cattle cars, always stood on the nearest track to the Academy. She never observed freight trains stalled and unable to pull up the grade between 7th and 9th streets. She thought they were left there until the track on which they were going was free. Sometimes they could not see the engines, the train was too long. The building ma-

terials were unloaded on some of the sidings and placed on the north side upon reservation 113, beyond the main line tracks. She did not know who conducted unloading operations. She heard the noises from the unloading of the stone and iron and the things of that sort. On the main running tracks between 7th and 9th streets there were engines there much of the time, and the regular freight and passenger trains passed along there at all times of the day and at all times of the night. They made noise. The heavy trains on those tracks nearest the Academy caused a great deal of rumbling and jarring. The traffic increased in the latter part of the period. The Academy for a great many years has been patronized by the Catholic families who formerly lived in South Washington, but they moved to the northwest and northeast sections of the city, because of the railroad. Some of their difficulty was that they were interfered with in the crossing of the tracks and getting from one end of the city to the other. Some of the children came of the families who moved away, and through all of that time, some who took special courses came and are coming, but not as much as the day scholars.

48 Thereupon E. J. BURT, a witness for the plaintiff testified:

That he lives at 714 B Street, Southwest, and conducts a news stand and notion store at 405 7th Street, Southwest. He has resided in the Southwest section of Washington about 40 years. He is familiar with the conditions regarding the use of reservation 113, from November 5, 1903, to November 5, 1906. He had occasion to go up and down 7th street from his house to his store, at least eight or ten times a day and also at night when he closed up at ten o'clock. The conditions were very bad. The railroads used that reservation for the unloading of materials for buildings, and coal. The building materials were principally stone and iron which were loaded onto wagons and carried away. The unloading was very noisy especially in the unloading of the iron. Frequently the beams would fall a distance of perhaps one or two feet against another iron beam, which would cause a noise which was very severe, especially to a nervous person. He has frequently seen eight or ten or twelve cars on the tracks, some empty, some loaded. The noise of coupling would be quite severe and bumping of cars. Then the letting off of steam was quite a usual occurrence there with engines. He has seen five engines standing between 7th and 9th streets at one time, and at least three of them blowing off steam at the same time. Usually black smoke came from the other two. If the wind was north or northeast or northwest it would drive the smoke towards the Academy. It was thick, black smoke. One time he got a dose of smoke in his face and it cost him two dollars to go to an oculist. You could feel the jarring for a square in each direction. The moving of these trains and also of these heavy cars, would cause

the jarring of the ground. There were a great many heavy  
49 freight trains passed by there at night on the main tracks  
for freight. There was not only a curve, but a grade which  
caused a great deal of puffing and smoke and noise from the engines.  
From the noise he judged that live stock was chiefly carried on

these trains. He observed horses, cattle, calves, sheep, geese, turkeys, and everything in that line. When they were blocked they had occasion to stop for a long time, and the odor was quite strong. Cars were not very thoroughly cleaned. He frequently saw them stop there five, ten or perhaps fifteen minutes. There were a great many excursion trains brought in and a great many excursionists were dumped out at 9th Street near the Academy of the Sacred Heart of Mary. They went all around the neighborhood and spent most of the day and half of the night in that immediate neighborhood. He even saw them at the Academy. The conditions of traffic were such that it was almost impossible to get either up or down on 7th Street without being blocked. From one to five or six or perhaps ten minutes. There was so much complaint the railroad company put a man there to see if they could not relieve it, but he did not see any relief that came from it.

Upon cross-examination the witness testified: That the coming of these excursionists was a frequent occurrence. One of the greatest excursion times is in September and October. The Academy opens in September. He has frequently seen excursion trains stop at 9th street. The engine would be at 9th Street, where there was just a freight station. There were block signal towers at 9th and 6th streets. The main track on Maryland Avenue to 6th Street depot left these main running tracks between 8th and 9th Streets, that is, the track upon which all the passenger trains came from the Long Bridge and the track they used to get into the 6th Street depot. The freights went down Virginia Avenue, and know that trains were stalled there, because of want of power. The engine frequently would go to the rear of the train and boost it up. There

was considerable grade in the curve, sharp curve, between 9th  
50 and 7th Streets. Has seen freight trains of several railroad

companies there, pulled by two engines. Never saw any blocked or stalled between 7th and 9th Streets on the main track with two engines on. When a train is blocked or stopped there and started up it caused a great deal of noise, jarring and rumbling. If there were any geese or chickens or pigs to smell, he got the odor from them. The five engines standing there would be on the sidings. The majority of ground between 7th and 9th Streets is reservation property. Do not know how many tracks were on there. He thinks about three side tracks used for the unloading of this material. The other tracks were on Maryland and Virginia Avenue. There were four tracks on Virginia Avenue and one on Maryland Avenue, had three on other reservations, had other sidings on the place between 8th and 9th Streets, principally the whole space was closed on account of tracks and the air was black with smoke, soot and cinders, and it depended upon which way the wind was, as to who got the benefit of that. Smoke, soot, cinders, noise came from all the trains operating along these tracks between 7th and 9th Streets.

Thereupon Sister ELIGIUS MARGARET MATTHEWS a witness for the plaintiff testified: That she was a resident of the Academy of the Sacred Heart of Mary from November 5, 1903, to November 5, 1906, and was at the Academy the entire day for about a year and

two months of that period, during the remainder of that  
51 period she remained at the Academy from 4:30 until 8:00  
o'clock the next morning. Between 8:00 o'clock in the morn-  
ing and 4:30 she was at St. Dominic's School, 6th and F Sts., South-  
west. The Sisters who taught at the Academy during the day re-  
mained at the Academy during the night. After her day's work  
was done had St. Dominic's School she returned to the Academy.  
There were eight or nine Sisters teaching at the Academy at that  
time who were not teaching at parochial schools and who remained  
at the Academy every night, and those who taught at the parochial  
school also remained. There were fourteen or fifteen Sisters remain-  
ing at the Academy during the nights for that period. She ob-  
served the conditions arising from the operations of the railroad in  
front of and near the Academy building. The most objectionable  
feature was the loss of sleep, suffered by the noises of the engines.  
Sometimes one engine would come along and stand in front of the  
Academy, puff smoke, puffing and using steam and make the most  
exasperating noises that it almost set one wild, and when you would  
think it was about time for these engines to move off another one  
would come along and stand there and take up the work and go on  
with the same thing. To her that was the most exasperating condi-  
tion of the night noises. Again it would seem sometimes, that the  
front yard of the Academy was turned into one vast barn yard.  
Animals would be brought there. Trains of animals would stand in  
front of the building and they would hear the squealing of hogs  
and the lowing and bellowing of cattle. That happened during the  
night and also through the day, but not as frequently as this stand-  
ing in front of the Academy, of these engines. She thinks  
52 she would hear the noises from the animals in the trains with  
live stock three or four times a week. These trains loaded  
with animals stood there for considerable periods of time. The loss  
of sleep occasioned by the noises caused witness to feel exhausted  
and tired out when she arose in the morning, and the noises com-  
menced before she went to sleep, there was no such thing of getting  
to sleep for a couple of hours. If they commenced after they got to  
sleep she was awakened and it was almost impossible to get to sleep  
after that. She saw shifting back and forth of trains, making up  
of trains, immediately in front of the Academy. She observed an  
engine which she thinks was called a shifting engine come along  
and take two or three of these freight cars up and run them down  
past the Academy and then probably go back again down through  
Virginia Avenue next and carry down or take up another car and  
then go back again past the Academy and down again, and some-  
times she has noticed eleven or twelve times for just one making  
up of that train. These occurrences came along frequently. She  
could not tell how long it took that engine to pass and re-pass eleven  
times, but it lost no time. It went only about half a block below  
the house about the same distance in each direction. She noticed  
smoke and dust. She has gone around the house and closed the  
windows along the side of the house when the smoke came in that  
direction toward the house and has closed the windows to keep out

the noise while hearing recitations, principally when these trains would stand in front of the house and let off steam. That was one of the most annoying noises about the matter that they had to experience. Sometimes these engines that made much steam were attached to trains and sometimes they were separated from them. The noises came whenever they were letting off steam and that was

53 very frequently. The noises came from the screeching and grinding noise of the wheels on the rails. Another condition was not unusual in front of the Academy, that was for freight cars to go off the track there. The derrick or hoisting engine would come along and get this car back on the track, that was accompanied by the noise of steam and the calling of men back and forth to each other. It happened in front of the Academy, that is it was in that block. She noticed cars a great many times since the sidings were put in and sometimes the cars were attached to locomotives, other times not. The Academy of the Sacred Heart of Mary closed in the summer as far as school work was concerned. The Sisters remained through-t the summer. School closed about the middle of June, and commenced about the middle of September. She was obliged to close the windows to keep out the noise while the recitations were proceeding, very often. She saw the children put their hands to their ears to keep the noise out themselves, because of the annoyance they suffered from it during the recitation. She discontinued teaching at the parochial school and went to the Academy to remain continuously in the vacation of 1905. There were more noises after that. She noticed odors proceeding from cattle cars.

Upon cross-examination witness testified: That as the time went on the traffic seemed to increase and the noises and smoke and dust also increased. She counted the trains that went into the station and those which passed in front of the house and the making up and breaking up of these freight trains, and the passing of engines for an hour and a half, and counted about twenty-seven times. The use of the tracks was practically continuous during the day time, in front of the Academy, and there were inter-upions. At times

54 they stopped there in front of the Academy. All the trains and engines that passed in *in* front of the Academy during this period, passenger and freight trains, caused a great deal of noise and in addition to that a great deal of jarring and rumbling.

Sister MARY EVELYN MURPHY a witness for the plaintiff testified: That from August 5, 1905 until November 5, 1906, she was resident at the Academy of the Sacred Heart of Mary and had occasion to notice the conditions existing in front and near the Academy caused by the operation of the railroad there very minutely. She was teaching in two rooms, between which she divided her time, both were in the immediate front of the building. The windows over-looked the tracks of the railroad. While she was in school the noise was very, very annoying. The seething and roaring of steam, the ringing of bells and blowing of whistles by the engines, and making and unmaking of trains, causing a bumping of cars

when they came together, the rumbling of the rails and the materials they were unloading from the cars, the cinders and puffing of engines, and sometimes the laborious efforts of engines coming in with heavy trains—all those things made a very serious noise, but principally the switching in front, they would interrupt the recitations very seriously. She means by switching, that engine moved back and forth and attach- itself to part of trains of cars and as the cars came together by the effort of the engine there was a loud bumping noise and the same engine with its cars would pass and re-pass in front of the building many times, not only freight, but also passenger. She had occasion to notice that in one half an hour the work would be interrupt- on an average of three or four times in that period of about that time, and one half an hour was

55 a good example of every other during the day. Recitation period was about thirty minutes in length. During one

recitation the recitations would be interrupted three or four times, making up a minimum of disturbances of five minutes to each recitation, one-sixth of the time would be interrupted in that way, and that was a fair average. She noticed clouds of heavy black smoke, laden with dust and cinders coming in the direction of the building and in through the windows of the building, so much that the windows had to be closed in the summer time, and if the windows were not closed, or even when they were, some of the soot penetrated, so that frequently all the sills of the windows were obliged to be swept on account of the soot that collected there. The furniture and clothing within the house was in bad condition from the effects of it. They notices this smoke circulating around the house and into the back yard, and the laundry on the line would be soiled from it, particularly in the rainy season, when the soot would settle, and the weather coming in contact with it would make it very disagreeable. The smoke that entered the Academy building was very offensive, it was gaseous, in many instances it would give you a strange feeling in the nostrils and throat when it entered, as it sometimes did. The noises came principally from the switching, making up and unmaking of trains in front of the building, and the passing back and forth of cars. She saw cars in front of the Academy laden with live stock, cattle in particular. The bellowing of cattle and the squealing of pigs were very noticeable at times. She noticed it many times that cars laden in that way would remain in front of the building on an average of perhaps of fifteen

56 to twenty minutes, not longer than that except on rare occasions. It was a very unusual thing for the space in front of

the building to be entirely free from the standing of cars. Only once she remembers that it was entirely free. The cars would scatter about in intervals of three or four on nine or ten, standing together and then four or five perhaps on another track. She has seen as many as three or four locomotives standing in front of the building. On account of the engines standing and giving off the gas and smoke they had to close the windows. Some of the engines would move off for an interval of perhaps fifteen or twenty minutes, but almost always there was an engine around the neighborhood,

at least one and sometimes more than one. The noise disturbed them at night as well as in the day. She remembers being awakened from sleep with a start thinking something terrible was happening, until she would be thoroughly awake and realized that it was only the incessant jarring of the trains. It would come from the bumping of cars, sometimes from the sudden emission of steam, and the sensation given you was of an engine bumping up and down on the track. She would probably be awakened two or three times during the night by such sounds. Sometimes it was very difficult to get to sleep again. The effect of the loss of sleep from that cause was nerve-racking, and the next day she would feel the effects of it and the next day had to contend with the same disturbances which tended to make them nervous. Two Sisters were engaged in teaching music all the time at the Academy. Pupils who lived on the north side of the track were tardy from time to time, at nine o'clock and one o'clock. The pupils went home to lunch. Tardiness occurred twice or three times a week, always from the pupils living north of the track. She noticed very disagreeable odors from the cars laden with live stock—very disagreeable.

57 Upon cross-examination witness testified: That immediately in front of the Academy is C Street and beyond that the railroad tracks. Shifting and moving of cars was on the main tracks very frequently. She would say that the side tracks were used more for the storing of cars than for switching. The cars that were on the side tracks containing materials frequently were switched over and left until unloaded, and the other tracks in front of the building were employed very often or entirely almost with the switching. A great number of trains during the night and day passed on the main tracks and all made noises, smoke and dust, and there was a jarring and rumbling from them, but they did not suffer as much from the disturbance of that as they did from the switching. The switching was of a longer period and a great variety of noise and louder. Very often the trains would stop immediately adjacent to the Academy, but not always. She did not know why the trains stopped there, and thought it was because there was not sufficient power, but frequently a second engine would assist the heavily laden freight when the trains were coming from the Long Bridge, and when they would stop again and start they caused a great deal of bumping and jarring and considerable noise.

Thereupon Sister ASSENTE DOYLE, witness for the plaintiff testified: That she has been a resident of the Academy of the Sacred Heart of Mary for over eighteen years continuously. She was teaching regular classes. She observed the conditions existing in front of or near the Academy building occasioned by the operation of the railroad, very obviously, from November 5, 1903, to November 5, 1906, when the worst of the annoyances was the noise from the cars during recitations. Recitations would have to be interrupted for five minutes of the time and that three or four times during a half hour's recitation. The children had to lose all that time, besides losing the thread of the subject of what-

58

ever was being taught. She means by interruption a cessation of recitation work. It was necessary to cease, they could not be heard, they would be obliged to stop recitation until the noise would be over and then continue at a very great disadvantage. Unless she stopped she was not able to hear the responses made by the pupils and they could not hear her. In some recitations these would occur three or four times, others only once or twice. The hours of school were from nine to twelve o'clock and one to three o'clock, Perhaps recitations would be interrupted two or three times and during the time the noise caused these interruptions was from the steam and the blowing of the whistle, and the heavy jarring of the cars, and the cars coming together. The steam was the greatest annoyance. She cannot describe it. It sounded like reports of guns sometimes, it was so sudden and so loud and forcible. The steam proceeded from the engines, sometimes attached to cars and sometimes detached. She has noticed two or three engines at a time in front of the Academy. They were on the main tracks and on the other tracks. The greater annoyance seemed to come from the engines that were standing there waiting for further use. She saw engines standing on the main tracks for shorter intervals. The engines would go from one section of the detached cars to another and bring them back and forth and the cars would come together with heavy jars and they would then detach or attach other cars and, seemingly, take them from one track to another. They would take them down one track and come back on the other side of the building,

59 that is, towards the east and the west. That perhaps would be done two or three times a day. The noise seemed very much increased at night. She noticed it more. They often kept her two or three hours at a time from sleep and many times would take her a long time before she could get to sleep again after being awakened by these noises. One engine seemed to remain in one place on the track twenty or thirty minutes at a time and it seemed they were just simply letting off steam. Bells were used almost continuously on these engines. The interruption of her sleep would make her very nervous and unfit for the work on the following day. There was scarcely any time during the day in which cars were not standing in front of the Academy building, sometimes with engines and sometimes without. Cars were made up into trains, sometimes not. She has seen two and sometimes three engines standing together there, for five, ten, fifteen or twenty minutes. Not all for twenty minutes, but one or two for that length of time. The smoke was heavy and gaseous the gases were really more offensive than the smoke itself as they permeated the building and were very offensive. The gases were those naturally coming from soft coal that was burned for fuel in the engines. Smoke troubled them every time a freight would pass. It was worse during the rainy season. It seemed to remain right in the locality and permeated the buildings too. In the summer the windows on the north side were frequently obliged to be closed on account of the smoke and dust and especially if the wind was from the north, northeast and northwest. She observed the stopping of excursion trains in that neighborhood

and the unloading of passengers, they were very, very annoying. They were usually a mixed and not a cultured gathering. It was very offensive to hear them and see them very often collected  
60 right in front of our steps leading into the building. In that neighborhood opposite us they entertained themselves there a greater part of the day and night, this was during the warm months. The excursionists came and rested and sat down on the iron steps leading from the sidewalk to the Academy which they used as public property. The excursionists were very numerous in the trains. The excursion trains stopped opposite the Academy building until the unloading of their passengers, at least two or three times a week during the warm months, beginning with the early summer and continued on until the latter part of October or early in the month of October. They seem to come from both directions. It was not only their coming in but their going out. They congregated there before leaving, and the cars would be standing right in front of the Academy and the excursionists would be there for hours before leaving the city and way into the night 11:00 or 12:00 o'clock at night. The trains would be standing in front of the building. The trains were long and extended almost to 7th street. She noticed trains leave the tracks in front of the Academy three or four times. The noise in getting them back was very annoying in addition to the other noises. The clanging of the iron and the extra steam which that necessitated. Music teaching was in progress from 8:00 until 12:00 o'clock and from 1:00 until sometimes 8:00 o'clock in the evening, with an intermission for supper hour. Both instrumental and vocal music were taught. Instrumental music was taught on the piano and string instruments.

Upon cross-examination witness testified: That the engines of the excursion trains stopped in front of the station at 9th street,  
but the cars were carried down further and left there and  
61 remained there during the day, and the excursionists took the train right in front of the Academy. She saw the excursionists get off from time to time at 8th street. This unloading of excursionists right in front of the Academy occurred on an average of two or three times a week in the summer months.

Thereupon Sister MARY EUGENE CONDON a witness for the plaintiff testified: That she was resident at the Academy of the Sacred Heart of Mary on November 5, 1903, to November 5, 1906. She was not there continuously during the day time, as she taught at St. Dominic's School and was away from the Academy from 8:00 o'clock in the morning until 4:30 o'clock in the afternoon. During the rest of the time she was a resident of the Academy. She observed the conditions arising from the operations of the railroad in front or near the Academy. She observed engines puffing smoke, hissing steam and cattle standing in the cars, and trains switching back and forth and trainmen giving orders and saying profane language in giving these orders and she has been kept awake night after night from the noise. These noises proceeded from the engines, from the steam and the puffing of the smoke, and they would

keep it up so long you could not possibly think they were doing it for any other purpose than to annoy the Sisters, this occurred every night and a great many times during the day. These noises were loud enough to keep you from sleep. You could not sleep no matter what you tried to do, you could not sleep at night. If she happened to fall asleep before they began she would be awakened with a dreadful start and just sit right up in bed, from the noise. Sometimes not until morning would she be able to get any sleep. She has not had

a real good night's sleep without being awakened sometime  
62 from the noise. It had the effect of making her very irritable

and nervous the next day in her work at school and was a hindrance to her work as a teacher. She does not remember of seeing the place in front of the Academy without cars standing there. She has seen three engines at a time standing there, for a long time. The noise of steam came from them and she cannot explain the noise, but it sounded something like a pistol or something like that, going off. Sometimes cars were detached and sometimes there were made up into trains. The engines and cars moved back and forth in front of the Academy building over and over again. It seemed they were taking the engines and one car down and they would meet another car and the two would bump together and they would go down and take on another, right on the first or second track near the Academy, but they did all on the different tracks. She saw them take up stone and iron and iron rails, big blocks of stone and different things on the sidings on reservation 113. When the materials were unloaded they made a noise. Iron rails being thrown down on the ground and in doing which they made a noise. Even during the night she has seen them pounding and fixing the tracks. She even had to get up and close her window to keep the smoke out. In her room was an open book case and a valuable set of books which were ruined from the dust and smoke. She could not stand the smoke nor the gas and noise. It was a little better when the windows were closed, still the noise was there. They were loud enough to awaken her when the windows were closed. She has even seen the passengers coming off the excursion trains right in front of the Academy door, and these colored people were so vile that she would be obliged to close the windows in order to keep from

hearing their vile language, also the colored people ate their  
63 lunches and threw their papers there into the yard and sat

right in front of the Academy. Sometimes they remained all day, then took the train at night, and they remained all around the academy until it was time for them to take the train; perhaps at midnight, or something like that. They were very rough and boisterous. That occurred about two or three times a week, but was the worst on Saturday evenings and Sunday evenings. This occurred during the summer months and September. The session for teaching terminated at the Academy about the 17th or 18th day of June and resumed the second Monday of September. The Sisters kept the Academy at all times and taught music there during vacation. During the summer months music went on just the same. The majority of the Sisters remained during the summer. About

four Sisters would leave for their vacation. Generally eleven remained.

Upon cross-examination witness testified: That the freight station of the defendant all these years was at 9th street and Maryland Avenue. She saw the shifting engine go back and forth and pick cars out of the trains very often, in front of their property. Noticed a great number of freight and passenger trains pass there on the main tracks. Cannot give an idea of the number, because they are always going, and made a great deal of smoke and dust, and jarred the building. The noise was the worst.

Thereupon counsel for defendant admitted that the tracks between 7th and 9th streets, both side tracks and main tracks were maintained, and to a large extent operated by the defendant in this case, and that they were tracks of the defendant Company. It was admitted that there was a .73 per cent grade from 7th to 9th streets.

64 Thereupon JOSEPH CRAWFORD, a witness on behalf of the plaintiff testified: That he has lived in Washington for thirteen years and is Special Agent of the defendant Company. Has held such position since January 1, 1908. From November 5, 1903, to November 5, 1906, he was the General Agent of the Philadelphia, Baltimore and Washington Railroad, the defendant, and had supervision of the freight and passenger stations, and the handling of business in Washington, and was familiar, to some extent, with the passage to freight and passenger trains over the various tracks of the defendant read, to the south end of the Long Bridge. From November 5, 1903, to November 5, 1906, the defendant Company was sending the trains of the companies that operated over the tracks of the Philadelphia, Baltimore and Washington Railroad, through the city of Washington, and that the trains of the Washington Southern Railroad, and the Chesapeake and Ohio Railroad and the Southern Railway, were operated over the tracks of the Philadelphia, Baltimore and Washington Railroad, from the south end of the Long Bridge in Washington. The defendant Company was operating its own trains over its own tracks from the Potomac River and through Washington. The defendant Company operated no passenger trains of its own south of the Sixth street Station, Washington. It operated its freight trains to the south end of the Long Bridge. He has not a clear idea as to how many freight trains the defendant operated of its own over its tracks per day to the south end of the long bridge through Washington. He is willing to swear that it sent as many as twenty freight trains per day over these tracks. At times as many as thirty operated over these tracks. It is possible that it sent over these tracks as many as forty or fifty freight trains per day. Witness meant by his statement that the defendant sent out over these

65 the trains of the other roads, that the trains of these other roads under agreement with the defendant were permitted to run their trains over the tracks of the defendant Company into Washington.

Upon cross-examination the witness testified that the Chesapeake and Ohio, the Washington-Southern, and the Southern Railroads were the other roads. The agreements with the other roads were in writing. It is testified that he did not have them. He does not remember how many trains were operated by the other roads except the C. & O. which operated four trains, two inbound and two outbound. The other roads did not operate freight trains.

Thereupon Sister MARY PHILIP SWEANY was called and further testified: That during the period from November 5, 1903, to November 5, 1906, the plaintiff was conducting its seminary at the Academy of the Sacred Heart, in this city. The number of pupils in 1903 ranged from eight to eighty-five. The number varried very little in 1904 and 1906. There was not a variation of more than ten pupils.

Thereupon the plaintiff rested.

Thereupon JAMES J. COOPER a witness for the defendant testified that he has been Assistant Passenger Train Master since November, 1907. Prior to that time, from 1896, he was both passenger and freight train master. Before then he was train master for three years. Prior to that he was in Baltimore with the Baltimore and Potomac Railroad. From 1893 to 1896 he directed the movement of trains in the city of Washington, by making arrangements to meet and pass and arranging for the movement and equalization of power and men and the movement of traffic and issuing orders by telegraph. The predecessor of the defendant was at that time the

Baltimore, Potomac and maybe the Philadelphia, Wilmington and Baltimore Railroad. The change of the name of

roads went into effect about 1901. In 1892 and up to the period between 1903 and 1906 the passenger station of the defendant and its predecessor was at 6th and B Streets and the freight station at 9th street and Maryland Avenue. There was one track on Maryland Avenue from the vicinity of the Academy of the Sacred Heart of Mary to the depot. His recollection is there were four tracks on Virginia Avenue. There was a tower at 9th and Maryland Avenue. About 1906 the tower was moved from 9th and Maryland Avenue to 7th street and Maryland Avenue, or between 7th and 8th streets. The tower governed the single track on Maryland Avenue, running to 6th street, and the operation of blocking of trains moving southward to 14th and Water streets. There was an ascending curve southward toward the Potomac River all the way from 6th and Maryland Avenue to 9th street. Going southward after passing tenth street there was an ascending grade on Maryland Avenue. There was a curve at 8th street. The lines diverge the freight trains to the north on Virginia Avenue and the passenger trains or tracks toward the 8th street station. The defendant and its predecessors unloaded their passengers at 6th and B streets. There were two tracks from the station to 6th and Maryland Avenue, and beyond northward, but one track from 6th and Maryland — to about 8th and Maryland Avenue, the cross-over switches connecting the single track on Mary-

land Avenue with the main running track at 8th street. He does not recollect the date the defendant company began to make use of the reservation north of the main running track on Maryland Avenue and Virginia Avenue, in the neighborhood of the Academy of the Sacred Heart of Mary, but the reservation was used for unloading material for the government buildings then being erected on  
67 the Mall. The defendant Company did not use any portion of this space of these tracks between 1903 and 1906 for unloading excursionists, but did unload excursion parties at 9th and Maryland Avenue.

"Q. At what other point in the City of Washington, between 1903 and 1906 did the defendant Company maintain yards for storing cars or the making up of trains, and where were those yards located?

A. You refer to the freight trains?

Q. Both freight and passenger.

A. What was commonly called the Jersey Yard, extending from South Capitol Street to New Jersey Avenue." There was another yard at Anacostia, beyond the Eastern Branch, between the river and Bennings. Freight trains that moved from northward and southward were made up there. Across the river west of 9th and Maryland Avenue the company placed cars to be handled or unloaded at 9th street freight ware-house, and moved cars after unloaded or loaded to move northward or southward. There was a yard known to railroad people as 11, 12, 13, and 14th street yards, but one yard commonly. The defendant Company operated these yards. The Southern Railway Company from 1903 to 1906 maintained and operated a yard at 14th and Water Streets for the handling of passenger equipment, making up of passenger trains, cleaning their cars, their locomotives, and turning—and so on. Between 1903 and 1906 all the passenger and freight trains, shifting engines that were moving back and forth from one of these yards west of 9th street to one of the yards east of 9th Street, passed over one of the four tracks then used for traffic between 7th and 9th Streets. Two of them for

passenger, chiefly, and two of them for freight, generally

68 Often times they were used as were found necessary and as conditions made it necessary. The most southerly track is the north bound freight track. The one leading to the north of that is used as a siding, and the one north of that is the southbound freight track, and the one immediately north of that is a siding. The single track on Maryland Avenue was the defendant's passenger track. In addition to the trains, freight and passenger and the switch engines of the defendant between the 1st of November, 1903 and November, 1906, the Southern Railway, the Washington, Southern Railway and the Chesapeake and Ohio Railway and the defendant made use of the tracks between 7th and 9th Streets.

"Q. Have you any independent recollection of the number of trains operated and moved along those tracks, between 7th and 9th Streets by the defendant and these other Companies?

A. I only remember there were over five hundred movements in both directions in the twenty-four hours. \* \* \* I mean by movement, the movement of a locomotive moving in one direction either empty or with cars."

He would say there were over two hundred movements of engines with one or more cars. These movements were fairly distributed throughout the twenty-four hours. He would say there were more in the hours between 6:00 o'clock in the morning and 12:00 o'clock midnight. In the shifting or placing in position of cars on reservation tracks between 7th and 9th Streets, nothing more was done than was absolutely necessary to do that work or perform all work in and out of these yards at night, because of the great number of

passenger trains during the day. It would have subjected all  
69 passenger trains which were mail carrying trains to great delay had anything of the sort been attempted in day light.

When trains going south were stopped by the block signal operator at 9th street, the engines as a rule would be brought to a stand still east of 9th street on Maryland Avenue. He does not recollect when the signal was changed, but it was changed several times. It was close to 9th Street which was sometimes necessary for the defendant Company and the other companies in the operation of long trains between 7th and 9th Streets after exhausting their steam endeavoring to overcome the grade, to use what they called the blower to get a greater pressure which would make a little noise. The engines in struggling, sometimes the wheels would slip on *on* account of the traction not being sufficient. The defendant Company during that time used Bituminous Coal in its engines, as were all railroads. Up to a late period the shifting engines used coke. The making up and breaking up of freight trains was done in the Jersey yards and in the Anacostia yards. There was only the necessary shifting at 9th Street, to place the cars in the several yards there. The passenger trains were usually made up or broken up in the New Jersey Avenue yards. Inadequate room in the 6th Street Station caused the blockading of cars on 6th Street. When these tracks were blockaded, as a rule, the engine stopped about 8th and Maryland Avenue and in that vicinity.

Upon cross-examination the witness testified that from November 5, 1903 to November 5, 1906, he was located at the station sometimes in the station, which is five or six blocks from 7th and C Street,  
about  $\frac{1}{2}$  mile. He usually reached his office at 8:00 o'clock

70 in the morning and as a rule remained until 12:00 noon, went to lunch, returned about 1:00, and remained until about 5:30 and lunch then went home. That was the rule. He obtained his knowledge concerning the conditions at 7th street and West by walking and riding during the day by telephone and telegraph. Nearly every day he was on the ground possibly ten times. His duties were everywhere and he would go out wherever duty called him. From 7th to C Streets to 6th and Virginia Avenue is 400 feet or more. First track is for moving freight northbound towards Baltimore, the next track was merely a siding that engines would frequently run around on. Sometimes a few cars stood on the siding. There was a siding that ran over from 6th and Virginia Avenue down to 10th or 11th street. It was used for passing around trains. One engine passing around another; sometimes a car shifted out of the warehouse. Sometimes the shifting of a car from the 9th Street warehouse took all the way from 6th and Virginia Avenue. Some-

times the siding was substituted as a running track, but the main use was to move freight trains or cars back and forth with an engine. The four tracks were always used for shifting out the warehouse at 9th Street, known as the warehouse track. These tracks were all used interchangeably for both shifting and moving traffic just as they were all used for moving traffic under the supervision of the yard master. Only two were known as sidings. The sidings could be used for through traffic and were sometimes. The sidings ran from the tunnel to 14th and Water streets. These tracks were used not altogether by the defendant company, by the tenant lines also. Sidings were used when necessary. The defendant Company had a

freight station at 9th street for the unloading and distribution  
71 of freight. Car load freight, coal etc. was unloaded in the other yards. Trains were not made up at 9th street, cars were shifted in and out. It is probably about 200 feet from 8th to 9th street. About one-sixth of the freight trains were made up in the New Jersey Avenue yard, the others in Anacostia. The only warehouse was from 9th to 10th street.

"Q. You spoke of excursion trains. What personal knowledge have you, Mr. Cooper, of what was done with excursion trains between 7th and 9th streets?"

"A. It may possibly have occurred six or seven times during the year, when an excursion train arriving from Richmond or some point South—not one of the defendant's excursion trains, however." Thinks he was on every excursion train that arrived or departed from that point. He made it his business to go there.

Thereupon counsel for the defendant to further maintain the issue upon its part joined offered in evidence a license, to the Philadelphia, Baltimore and Washington Railroad Company, signed by William H. Taft, Secretary of War, dated December 15, 1904, allowing the defendant company to temporarily place four side-tracks upon U. S. Government Reservation No. 113 between 7th and 9th Streets and Maryland Avenue and C Streets, S. W., upon payment of an annual rental of \$1375, and also a letter from Assistant Secretary of War Oliver, dated June 2, 1905, increasing the scope of said license. Said counsel further offered in evidence vouchers of the Philadelphia, Baltimore and Washington Railroad Company, four in number, one dated October 25, 1905, for \$286.45, another dated December 15, 1905, for \$687.50, another dated June 15, 1906, for \$687.50, another dated January 10, 1907, for \$572.92, to the order of Colonel Charles

S. Bromwell, in charge of public buildings and grounds,  
72 which vouchers contained a receipt signed by said Bromwell and were endorsed by him,—being vouchers covering the period from April 15, 1905 to November 30, 1906.

And thereupon counsel for the plaintiff objected to the introduction of said papers in evidence upon the ground that in this action the Government could not give the defendant any authority that would avail it in any way as a defense to this action—that as between the plaintiff and the defendant these documents could give no authority to do, upon the premises referred to, acts which would in-

jure the property of abutting private owners, even though the object was for public use and benefit.

And thereupon the Court said: I think it relevant to show that the railroad company had the right to operate on this reservation. The extent to which the permit justified the operation which actually transpired is another question to be governed by instruction to the jury. The objection to the permit and the letter is overruled and the objection to the vouchers is sustained.

To which action of the Court in admitting said license and letter the plaintiff reserved this its — exception, which exception was duly noted by the Court upon its minutes.

The said license and permit so offered and admitted in evidence are in the words and figures following, to wit:

"136 H.

J. A. G. O.

Revocable License.

The Philadelphia, Baltimore and Washington Railroad Company is hereby granted a license, revocable at will by the Secretary of War, to temporarily place four side tracks upon the United States Government Reservation No. 113, between 7th and 9th Streets and Maryland Avenue and C street S. W. Washington, District of Columbia, to enable said railroad company to furnish safe and adequate accommodations for and to facilitate the delivery of large quantities of building material and other freight intended for use in the construction of the new buildings for the Department of Agriculture, the National Museum, and the Municipal Building of the District of Columbia now in course of erection; upon the following provisions and conditions:

73 1. That the work herein permitted to be done shall be subject to the supervision and appeal of the Officer of the United States Army in charge of Public Buildings and Grounds.

2. That upon the relinquishment or revocation of this license, said licensee shall remove said side tracks and all other property which it may have on said premises, within such time as the Secretary of War may indicate; and upon its refusal, neglect, or inability to remove the same, the Secretary of War may cause them to be removed, at the expense of said licensee; and no claim for damages against the United States, or any agent or officers thereof, shall be created by or made on account of such removal.

3. That said reservation shall be used by said licensee only for the purposes specified in this permit.

4. That the said licensee shall pay to the United States, as rental for the use of the said reservation, a sum computed at the rate of \$1375.00 annually; said rental to be paid in semi-annual instalments on the 1st day of January and on the 1st day of July, so long as this license is not relinquished nor revoked.

5. That any sum which may have to be expended, after revocation of this license, in putting any premises or property hereby authorized to be occupied or used, in as good condition for use by the United States as it is at this date, shall be repaid by said licensee on demand.

74 Witness my hand this 15th day of December, 1904.

WM. H. TAFT,  
*Secretary of War.*

(Endorsed on back as follows:)

"Rents payable. Office of the Secretary.

P. B. W. 384.  
3095.

Revocable License.

"Office Chief of Engineers.

53453.

Cancelled.

War Department.

Sect'y of War

to

Philad'a, Baltimore, & Washington R. R. Co.  
for

Reservation #113 S. W.  
Washington, D. C."

"File No. 136 J.

WAR DEPARTMENT,

WASHINGTON, June 2, 1905.

Referring to War Department instrument of December 15th last, granting the Philadelphia, Baltimore and Washington Railroad Company permission to place certain tracks upon the U. S. Government Reservation No. 113, between 7th and 9th streets, and Maryland and Virginia Avenues and C Street, S. W., Washington, D. C., for unloading and delivering building materials and other freight

75 for use in the construction of the new buildings of the Department of Agriculture, the National Museum and the new

Municipal Building for the District of Columbia, and replying to your letter of 24th ultimo, addressed to the Chief of Engineers, U. S. Army, in which you request that the scope of the license be enlarged so that the Company may also use the reservation for unloading the materials for the War College Buildings and office buildings for the U. S. Senate and House of Representatives, and other materials for the use of the Government. I beg to inform you that the further permission as outlined, is hereby granted, it being understood that no additional tracks are to be laid across the reservation and that only materials and other freight strictly for the use of the Government of the United States and the Government of the District of Columbia shall be unloaded upon the grounds.

Very respectfully,

ROBERT SHAW OLIVER,  
*Ass't Secretary of War.*

Mr. Joseph Crawford, General Agent, The Philadelphia, Baltimore and Washington Railroad Company, Washington, D. C."

76 Thereupon WILLIAM F. GREENE a witness for the defendant testified: That he is and has been Supervisor of the defendant in Washington since May 1, 1905, and his duties are main-

tenance of track and supervising the men engaged in that work. Tracks were laid down and taken up under his direction. When he came to Washington, May 1, 1905, the work of constructing the four sidings in reservation 113 had been started. He completed that work May 19, 1905. The tracks remained there until October 1906. The first connection started in the southbound main track at a point about 50 feet west of 9th street, and from that connection these connections were made showing the four sidings on reservation 113. These side tracks extended east just clearing the sidewalk line of C Street and the sidewalk line at 7th street. As Supervisor he had occasion to be in the vicinity of the premises of the plaintiff between 7th and 9th street-, from May 1905 to November 1906, and saw the movements with the side tracks in the day time in reservation 113. The side tracks were full of loaded cars, but does not recall seeing a definite movement of shifting which was done in the night time. Structural steel and stone work for the Government buildings was loaded in

these cars. Thinks these tracks were removed between the  
77 1st and 15th of November 1906. Ninth Street was closed to traffic October 31, 1906, in order to permit the excavation for the Maryland Avenue Subway. December 31, 1906, 7th street was abandoned. Eight- street was opened November 1, 1906, and a crossing constructed of wooden planks and was guarded by a gate-man and flagman. Seventh street was closed to permit the erection of the 7th Street bridge and to lower Capital Traction Company's tracks. These were a part of the general elimination of grade crossings. There was no concrete mixer or anything of that kind in reservation 113 until after November 1, 1906. The mixer was used to mix concrete for building the retaining wall for Maryland Avenue between 9th and 12th streets. It was operated by a stationery steam engine. It was located near the northwest corner of the reservation about two hundred feet from the Academy in a direct line. The nearest one of these reservation tracks was one hundred and sixty-five feet, as shown by sealing map. No dirt, gravel or other material from cut west of 9th street was unloaded on any part of this space between 7th and 9th streets. The dinky engines began to operate there in January 1907. The side tracks were taken up because 8th street crossed the center and the space was desired as a material yard for contractors who were building the retaining wall on the north side of Maryland Avenue. That was all subsequent to November 1906.

Upon cross-examination witness testified: Ninth street from curb to curb is thirty-two feet, from curb line east side of 9th to curb line west side of 8th street is 250 feet. It is 250 feet from west side of 8th street to the east side of 7th street. The average length of —  
78 freight car is from 35 to 40 feet and there are from 1 to 50 in a a train. He made the map on the wall, finished it November 20, 1909. All the tracks were there May 1, 1905, except the reservation tracks. It is under his charge to clear the wreck when the cars go off the track. He thinks there were a couple of derailments on the main tracks near the Academy before November 5, 1906.

Thereupon ROBERT FARNHAM, JR., a witness for the defendant testified: That he is a Civil Engineer for the defendant and has been such in this city since March 1903. He has had charge of the new construction work in the reconstruction, and the elevation and depression of tracks of the defendant under the Grade Crossings and Union Terminal Acts. Reconstruction began in vicinity of Academy of the Sacred Heart of Mary in either November or December 1906. Seventh and Ninth streets were abandoned about latter part of November and Eighth street opened for a temporary roadway during construction work at 7th and 9th streets. Gatemen and watchmen and gates were placed at 8th and they cared for the pedestrians. The Academy is in square 434, the next square is 410, and where the freight station was is 386. The southerly line of the reservation at the curb line of the street, he assumes, C street runs in front of Academy from 7th to 9th street. C street was not ever there occupied by railroad tracks. The main running tracks were on reservation 113. The main line freight tracks were on Virginia and Maryland Avenues and reservation 113. A single track runs north in the direction of 6th street depot on Maryland Avenue and the reservation. There was no concrete mixer there in connection with his work, prior to the time the improvements were begun, 7th and 9th streets closed and 8th street opened, nor did he see anything of the kind there in connection with other work. A great

79 deal of material out of Maryland Avenue was taken over to 6th street by construction trains operating between 7th and 9th streets. A very small amount was taken out between 7th and 9th streets. He began to dump material between 7th and 9th streets in early part of 1907. From November 1903 to November 1906, there were no hoisting engines or anything of that kind in connection with the railroad improvements between 7th and 9th streets. The defendant was elevating the tracks from South Capitol to 7th. The tunnel was from 2d street east to Eighth street east. The tracks were elevated across the causeway from Water Street to the new Long Bridge. Previous to November 5, 1906, no material trains operated by the defendant operated along this main track and these side tracks from points west of 9th street to points east of 7th street. He was in this vicinity occasionally, possibly once a week in the day time during this period. He saw cars there, but never saw any cars placed there. He did not see any switching movements in the yards proper. Never noticed any cars placed for unloading in connection with the freight station. He saw cars there. When improvements of 7th street *was* begun the street was lowered on one side first. The west side was kept open for five or six months after the work started by means of a plank roadway, that is about all that was done, the street was abandoned after the roadway was taken up.

Upon cross-examination witness testified: That it is possible the railroad tracks may cross within the building line of C street, and the nearest track may possibly be on C Street at 7th street. In between the two roadways of C street is the reservation. Maryland Avenue, Virginia Avenue and C street converge there.

80 Thereupon CHARLES F. FLEMING, a witness for the defendant testified: That from 1901 to this June he was and now is Car Recorder of the defendant at the freight station, 9th and Maryland Avenue. The offices of the said station were on the building line of 9th Street and the tracks for receipt of cars were just on the inside of the building line on Maryland Avenue. The platforms were about thirty feet inside the building line of Maryland Avenue. They were about forty feet from 9th Street and ran practically to the building line at 10th Street. The tracks for loading freight were on Maryland Avenue side of station. Shifting for the station is done West of 10 Street. From November, 1903, to November, 1906, there were four tracks on Virginia Avenue and one on Maryland Avenue—those tracks, he seems to recall, were there as far back as 1892. The four small tracks on reservation were completed about May, 1905, and were used for the delivery of carload material for the City and National Buildings. He had charge of the cars placed for unloading on reservation 113. He does not recall that he put anything there which was not for Government use. The operations for placing cars, as he recollects, upon these reservations tracks, were carried on between midnight and say 2 A. M. The Maryland Avenue track was used for passage of trains to and from 6th Street passenger station. The other four tracks were used for the passage of through freights from North to Southern points across Long Bridge and for the yard work of the City. These tracks were not used for storing cars. If the cars were allowed to stand there for any length of time after the reservation tracks were put in they were placed west of 9 Street entirely. Cars were placed on the reservation tracks for unloading. The different draymen of the consignees did the unloading. The defendant did none of it. The shifting operations going on on the main tracks in connection with the reservation tracks was done entirely at night. He has seen shifting operations in connection with the track leading to the 6th Street depot.

81 It was a regular thing to bring cars out of the passenger station and go down to the Southern Railway yards. The defendant has yards at New Jersey Avenue called the Jersey Yard. The freight yards were at Anacostia. The freight business was made up there and passed through Washington in solid trains. The third track was used for freight trains from the North over the Long Bridge. The most southerly tracks were used for through freight trains coming from the South. That is the nearest to the Academy. Does not think the tracks from November, 1903, to November, 1906, were in C Street in front of the Academy unless it was some portions of the main tracks resting on the streets. Does not recall any cars going off the track there. Coke was used in the engine that operated the derrick used for loading and unloading cars on reservation 113. First two days derrick was used soft coal was used and not thereafter. Very little smoke was given off by the engine. Between November, 1903, and November, 1906, he very often saw freight trains stalled there between 7th and 9th Streets—on the southbound main track—the third track. There was a block station at this time at 9th Street—his recollection is during the entire

period. Trains approaching the passenger station from Long Bridge struck the cross-over switches about 100 to 125 feet from 9th Street between 8th and 9th. If such passenger trains received a signal that track was not clear along Maryland Avenue to the station they made it a rule to stop the engine generally West of 9th Street to clear the crossing.

Upon cross-examination the witness testified: That he has been car recorder for defendant since 1892. The first siding between 7th and 9th Streets was used for the passage of North bound freight trains; also for the passage of yard engines taking freights from 9th Street warehouse to New Jersey Avenue yard. The siding from 7th to 9th Streets was used for the passage of trains. If the trains were to stand there it would interfere with business. The second track is simply for yard work, the four tracks being necessary to go to

82 and fro there. It was more of a passenger track than a siding. Freight cars were backed up there to be stopped between 9th and 12th Streets to be shifted as occasion demanded. This is the track for through passage from outer yards. All these tracks were used in connection with traffic from the New Jersey yards or Anacostia to these lower yards as occasion demanded. This siding (indicating another track) was used in connection with passenger cars principally coming from 6th Street station, which could be brought up and backed in for the engine to run around and handle them. He kept a record of all cars for local delivery, in the city from all directions and of all the freight trains which came into the 9th Street Station. He saw that the cars were properly distributed, loaded or unloaded. Cars for local delivery usually stopped at the Jersey yards. Freight from the South was taken to Anacostia yards. If something was in the way of the trains they would continue down through the city east of 7th St. and be backed off to New Jersey Avenue Yard. These tracks he would not call sidings but yard running tracks.

"Q. That is, tracks used for making up and breaking up trains? Is not that what yard tracks are? A. For the general handling of cars in the yard and the passage of trains."

He considers those tracks stopping this side of the tunnel and running down to 14th Street a part of the defendant's yard tracks and defendant handled freight trains, freight cars and shifting engines as the exigencies of the business might demand. Soft coal was used on through trains—it was not used on yard engines within the city limits. Coke has been used for about nine years on yard engines. All package freight for local delivery was brought to 9th Street station. Carload lots went to other sections of the City. Had a warehouse at 9th Street. If in bound package freight was not taken away in four days it was sent to public storage. Freight loaded from all sections of the city had to be hauled to platform at 9th Street to be shipped.

83 Thereupon CHARLES E. LOWE, a witness for the defendant testified: That he is an engineer and was yard clerk and engine man for defendant from 1903 to 1906.

"Q. Where were you stationed? A. I was stationed most of the time at 8th Street yard, as we call it, then between 7th and 9th Streets."

He went into that yard about the middle of May, 1905, and left there about October, 1906. It was used to unload Government freight. He was there every week day. The cars were put into position in the night. They began unloading in wagons at half past seven or eight and wound up about half past four. Different draymen did the unloading. A derrick or crane was used for heavy material. A steam locomotive generated the power. Coke was used as fuel all but two days—first two days soft coal was used, after that coke altogether. That crane was on the third track from the top (North). There was no mixer while he worked there. He left about October, 1906. Did not see such material as gravel or cement dumped there.

On cross-examination witness testified: That the crane by which this material was unloaded on this reservation belonged to the defendant and so did the engine. Witness operated the crane. The defendant paid him. He was there subject to the draymen's orders. He had to wait on them. He put into operation a hoist that hoisted the material off the cars and let it down in the wagons. He did that in connection with all the freight brought there. He had some very heavy iron beams, bags of cement, heavy blocks of stone and coal and there may have been some brick. He ran the engine to operate the crane to lift all that material off the cars and put it on the wagon that came for them. Did not unload any of it on the ground—always left it standing in the cars until the wagons came. The cars were placed there some time during the night. Most of unloading was done between half past seven in the morning and half past four in the afternoon.

84 Upon re-direct examination witness testified: That he was working subject to the orders of the draymen who were unloading that material into the wagons.

Upon re-cross examination witness testified: That he operated the engine on all occasions and got all his pay from the defendant railroad company.

Whereupon Dr. WILLIAM TINDALL testified: That he is Secretary of the Board of Commissioners of the District of Columbia and produced the Act of Council, Chapter 26, page 18, approved May 24th, 1866, Section 7, which including the title is as follows:

"An Act Granting Certain Privileges Additional to Washington, Alexandria and Georgetown Railroad Company.

SECTION 7. And be it enacted that the said railroad company shall be required to erect *and* permanent and commodious station house and freight and passenger depot on Maryland Avenue between 7th and 10th streets west, and at no other point in the City of Wash-

ington, and always keep the same in repair under penalty of forfeiture of the privileges conferred by this act; and also that the said company shall be required to fully protect the interests of this city in regard to rates of freight and travel, allowing no discrimination to be made against it in favor of any city, or locality, and further that there shall be required a publication of the freight and passenger tariffs from Baltimore and from Washington to all points on and connections with said road."

He also had the original act of the legislative assembly of the District of Columbia approved June 26th, 1873, laws of the third session. The title of the act and sections three and four are as follows:

"An Act to Regulate Running of Railroad Trains and Engines on the Streets and Avenues of the City of Washington.

SECTION 3. And it is further enacted that it shall be unlawful for any railroad company running its tracks through any street or avenue of the city of Washington to obstruct any of said streets or avenues by depositing lumber, ties or other material used in the construction of railroads or to unload other freight or merchandise of whatever nature or description, in any of such streets or avenues, at any point in said city other than the regular stations established for such purposes.

SECTION 4. And be it further enacted that the Baltimore and Potomac Railroad Company and the Alexandria and Washington Railroad Company shall have or cause to be erected a substantial iron or paling fence not less than five feet high along each side of three track or tracks within the city of Washington from the depot or depots at the corner of 6th and B Streets, northwest, along 6th

Street to Virginia Avenue, along Virginia Avenue to 3d Street, southwest, and also from the intersection of 6th street and Maryland Avenue, along Maryland Avenue to 9th Street, southwest, with sliding gates at each street crossing, to be closed while locomotives are passing, and provided further, that no part of said enclosed space shall be used for the purpose of parking or depositing goods or material of any kind."

Thereupon M. W. BOWIE, a witness for the defendant testified: That he has been the freight agent for the defendant since January 14th, 1901, before that Chief Clerk and in various positions since 1882 for defendant and Baltimore and Potomac railroad. From 1882 to August 14, 1906, he was stationed at Ninth street and Maryland Avenue. He was also freight agent for the Chesapeake and Ohio and Washington Southern and Southern Railway Company. From November 1903 to November 1906 the defendant, the Washington Southern Railway and the Chesapeake and Ohio used the freight station at Ninth Street and Maryland Avenue. He does not know the age of said station prior to 1882. He is familiar with the situation, location and number of tracks which the defendant maintained and operated between 7th and 9th Streets on the

space in front of the Academy formed by the intersection of Maryland Avenue, Virginia Avenue and C Street between November 3d, 1902, and November 3d, 1906. "There were four on Virginia Avenue and three on Maryland Avenue and four on reservation 113." The tracks on Maryland Avenue and Virginia Avenue have been there a great many years—were not all there when he went to work for the company. The four side tracks on reservation 113 were first used May 19th, 1905, and last freight car was removed October 20, 1906. These tracks were used for unloading freight for use in the construction of Government Buildings then being erected. It was under his general supervision. He does not recall that any freight was unloaded there which was not for the Government except one car. The tracks on Maryland and Virginia Avenues were used for the passage of freight trains, empty passenger cars going to New

86 Jersey Avenue or coming from there going to the Southern Railway, or to be switched by the "Y" at Maryland Avenue to 6th Street station, and the switching of engines that

moved the various cars loaded and unloaded to the yards east and west of that point and reservation 113. During those years the company did not make or break up the various trains except at New Jersey Avenue and Anacostia yards. Had freight yards 12th to 14th and Water Streets. The Southern Railway maintains a coach yard about 12th and Water Streets. The cars taken from the 6th Street depot by the latter Company passed between 7th and 9th Streets. Cars to or from Jersey and Anacostia yards and the yards west of 9th Street passed over the same tracks. All four tracks were used for the same sort of business. The tracks designated sidings to-day were nothing more than a continuation of tracks for through business. They had cross-overs or switches between 7th and 9th streets. When one track was blocked by a train or shifting engine the next moving train would be switched into the other track. On the east side of 9th Street was a signal tower between 1903 and 1906 and controlled all movements east and west for the passenger and freight trains. If a train was going towards the Long Bridge and were held up by the block at 9th Street the engine would be held east of 9th street. If going the other way west of 9th Street—engine right at the building line. The crossovers are about at the center near what would be 8th Street. A train on Maryland Avenue held up going to depot would stop its engine generally west of 9th Street. Shifting on the reservation tracks was done after six o'clock in the evening and as near midnight as possible between that and two or three o'clock in the morning. He thinks that was to prevent complaint from residents in the neighborhood. No shifting was done on that space in the day time in connection with the freight station. The switching engine would bring the cars from Anacostia yards to 10th Street and backed into 9th Street station or they would be taken out of 9th Street station

87 at 10th and carried eastward or north. During all that time there was no unloading in front of the Academy except on those four reservation tracks. The excursion trains from the South as a rule stopped west of 9th Street. The engine was at the

building line and the train west of that. Did not see any trains loaded with excursionists from the north. The improvements in the vicinity of 7th and 9th Streets were begun in November 1906. Prior to that there was no unloading of concrete or anything of that kind for the railroad improvements on reservation 113. He saw a good many Italians pass. Know they were used in taking the tracks. He has seen a good many engines stalled. This was caused by grade and curves between 7th and 9th Streets, and probably heavy trains. Has seen passenger trains flagged and stopped between 9th and 7th Streets. That would occasionally occur, though seldom, as they were generally held west of 9th street. The draymen or consignee or contractor w-o did the government work did the actual unloading on reservation 113. He had a young man, Charles M. Lowe, in charge of the derrick and engine that moved it. He was turned over to the draymen of the contractor. He operated the engine and took his orders to hoist or lower the derrick entirely from the men who were doing the hauling. Coke was used in that engine. He was there every day and there was no mixer there during the period. Sometimes when those trains would be blocked, a car would become derailed in starting at almost any point between 7th and 9th Streets, especially about 8th Street where the acute point of the curve was. If a car was derailed a wrecking engine would be there, but he never saw one there over an hour. There was a freight station at Rosslyn and cars were taken there. The Potomac yards now there were not opened for traffic until August 1906. The four tracks on Virginia Avenue were used by Southern Railway for passenger cars only. The defendant, Chesapeake and Ohio and Washington Southern used them for both passenger and freight cars.

88 Mr. Lowe was under the control of the persons who came for freight to the extent that they pointed out the cars they wished to unload, presented their bills to show they had paid the freight on it, and he would run the derrick up by the side of the car and at their order would lower the chain and hook for them to attach to the stone or iron, whatever it might be, and at their direction would hoist the same and place it on their wagons, entirely taking instructions from them. Lowe acted by their instructions in the respect that he adjusted the crane. When the man at the wagon said "enough" he stopped lowering and when the man said "raise," "hoist" or "enough" he lifted the stone. That is all the men did. They told him how, when and where to lower, but they were not allowed to operate the crane. The defendant loaned the crane with the man to run it to the loader or unloader. Mr. Lowe was paid by the defendant. Witness was in and out of his office during business hours.

Thereupon JOHN F. SMOOT, a witness for defendant, testified: That he is rate clerk for the defendant. Between 1903 and 1906 he was employed under Mr. Bowie part of the time by Mr. Bowie at 9th Street and Maryland Avenue and part of the time at 4½ and E Streets. He went to former place October 10th, 1877, and

at that time Baltimore and Potomac Railroad, operated that station. He thinks the Alexandria and Fredericksburg also came in there.

Upon cross-examination the witness testified: That he could not tell how many tracks there were in 1877. He was only a messenger boy for the office and served notices of freight on the merchants around town. He is certain there was one track but would not swear there were two.

89 And thereupon counsel for the defendant to further maintain the issues upon its part joined invited the attention of the Court to the following Acts of Congress:

Mr. FLANNERY: It is not necessary to offer in evidence acts of Congress showing the authority for the maintenance of tracks and stations by the defendant company, and I shall simply call your Honor's attention to them and that will close our case.

First is the act of Congress of August 3, 1854, (10 Statutes at Large, 810), which authorized the Alexandria & Washington Railroad Company to locate a depot or depots at such points in the cities of Washington and Georgetown as the corporations of those cities might determine, for the unloading of passengers and freight.

Then comes the act of the Common Council of the City of Washington, chapter 26, page 18, approved May 24, 1866, which Doctor Tindall read yesterday, in which the corporate authorities of the City of Washington designated Maryland Avenue between 7th and 10th Streets as the point at which said depot might be constructed.

The Baltimore and Potomac Railroad Company, which was the predecessor of the Philadelphia, Baltimore and Washington Railroad Company, was incorporated by an act of the General Assembly of Maryland of 1853, and came into this city by the act of Congress of February 5, 1867, (14 Stat. at Large), and was given the same powers and privileges that it had under its Maryland charter, among others being the right to have as many tracks as it saw fit at or near its station, and to build stations and construct other works in connection with its business.

That act was subsequently slightly modified so far as the route was concerned, the company having selected this route up Virginia Avenue as far west as 9th Street, and that was approved 90 by Congress on March 18, 1869, (16 Stat. at Large, page 1).

Subsequently that same company, the Baltimore and Potomac, which has been shown to be the predecessor of the present company, by act of Congress of May 25, 1870, (16 Stat. at Large, page 78) was authorized to adopt a line extending northwestwardly to Virginia Avenue, there intersecting and passing along the line described in said act approved March 18, 1869, as passing along Virginia Avenue northwestwardly to the intersection of south C and west 9th Streets.

The act of Congress of June 21, 1870, known here as the Long Bridge Act, gave the Baltimore and Potomac Railroad Company the power to extend its line to and over the Long Bridge, to take that bridge and make use of it in perpetuity, providing however that it have the railroads coming from Virginia the right to occupy and use said bridge.

The other act referred to by Dr. Tindall is the legislative assembly act approved June 26, 1873, which referred to the stations of the Baltimore and Potomac Railroad Company and the Alexandria & Washington Railroad Company at 6th Street and Maryland Avenue and 9th and C Streets, and provided that no freight should be unloaded except at its stations.

The next act upon which we rely is the act of 1891, January 19, 1891, (Stat. at Large, page 718). Your Honor will recall the number of the square upon which the freight station is located is Square 386. That act, among other things, authorized the Baltimore & Potomac Railroad Company to use for railway purposes of turnouts and sidings and switches and so on into certain squares, the ground between the Anacostia or Eastern Branch of the Potomac River and the Long Bridge, in the City of Washington, and authorized the company to connect those squares of ground with its railroad or main running tracks, and among others, mentioned Square 386.

91 Then the subsequent statutes of February 12, 1901, and February 28, 1903, are the statutes under which the grade crossing improvements and the Union Station were constructed.

The act of February 12, 1901, authorizes the Baltimore & Potomac Railroad Company to consolidate with the Philadelphia, Wilmington & Baltimore Railroad Company, and it changed its name to the Philadelphia, Baltimore & Washington under that act. The subsequent act recognizes that as having been done.

The Baltimore & Potomac Railroad Company, under the act of February 12, 1901, was compelled and directed and required to abolish grade crossings throughout the City of Washington, especially in South Washington, and the routes prescribed were these: "Beginning at a point in its present tunnel \* \* \* thence along said last mentioned section of Virginia Avenue to a connection with its present four main tracks and right of way near Delaware Avenue; thence continuing said four tracks along and on said Virginia Avenue and Maryland Avenue to the Potomac River."

That is in the act of February 12, 1901, which antedates this proceeding.

Section 7 of the act of 1901 further provided as follows:

"That to enable said Baltimore and Potomac Railroad Company to effect the revision, change and improvement in the alignment and grade of its railroad, and the relocation of parts thereof as authorized and contemplated by this act, the following named streets and crossings in said City of Washington shall be, upon the completion of the work herein authorized, completely vacated and abandoned for public use, namely: \* \* \* Virginia Avenue, on the south side of said railroad, between Second Street and Four-and-a-half Street, Southwest, and on the north side of the said railroad between Four-and-a-half Street and Seventh Street, Southwest. Maryland Avenue, on the south side of said railroad, between Ninth and Tenth Streets, Southwest."

92 Section 8 of that act authorized the railroad company to use for tracks and other corporate purposes the parts or portions of the several streets and crossings which were by that act vacated and abandoned.

Section 10 of the act of 1901—this being the section upon which we rely in addition to the license to show that we have authority to connect our main running tracks with the sidings placed on the Government reservation—further provides as follows:

"It shall be lawful for said Baltimore and Potomac Railroad Company to extend and construct, from time to time, branch tracks or sidings from the lines of railroad authorized by this act into any lot or lots adjacent to any street or avenue along which said lines of railroad are located, upon the application of the owner or owners of such lot or lots, to enable such owners to use said property for the purposes of coal, wood or lumber yards, manufactories, warehouses, and other business enterprises."

I have heretofore offered in evidence the license, and your Honor permitted it in evidence—the license and the amended license—authorizing the railroad company to use said reservation for Government purposes, and in connection with that license I direct your Honor's attention to the act of July 1, 1898, placing all public places laid down as reservations on the original map of the City of Washington, under the jurisdiction and control of the Secretary of War, acting through the Chief of Engineers; also to the decision of the Supreme Court in the Potomac Flats case, 174 U. S. 196, and also the recent case of Walter vs. McFarland, 27 Appeals D. C., 182, which holds as follows:

"The title in fee to all streets and public reservations in the City of Washington is vested in the United States, and the public parks have been specially entrusted to the care and supervision of  
93 one of the departments of the general Government."

With that offer, if your Honor pleases, I close the case for the defendant.

Thereupon counsel for the defendant moved the court to instruct the jury to return a verdict for the defendant but said motion was overruled.

Mr. WILSON: "Do I understand as to each one of these prayers which is granted and refused, an exception is noted without further application."

The COURT: "Yes."

Thereupon counsel for the plaintiff offered the following instructions:

1. The jury are instructed that Congress cannot by law, nor can the Secretary of War by permission give to the defendant corporation the right to interfere with the plaintiff's legal use of its property without providing compensation for whatever injury said corporation may inflict.

197 U. S. 567.

Refused and ex.

W.

Which instruction was refused by the Court to which action counsel for the plaintiff duly reserved their exception which was noted by the Court on its minutes.

94      2. The jury are instructed that neither Congress nor the Secretary of War can give the defendant corporation the right to invade the private rights of the plaintiff and interfere with its proper use and enjoyment of its property, even though the invasion or interference be for a public purpose, without payment of compensation for such injury as said corporation may inflict.

197 U. S. 569.

Given Ex.

W.

3. The jury are further instructed that the plaintiff has a legal right to the proper use and enjoyment of its property for such purposes as it may see proper to apply it, free from the annoyance, interference and disturbance of the defendant corporation.

Which instruction was refused by the Court to which action Counsel for the plaintiff reserved their exception, which was noted by the Court on its minutes.

4. If the jury find for the plaintiff they should assess damages in such sum as in their opinion will fairly and reasonably compensate the plaintiff for the injury it has sustained in the deprivation by the defendant corporation of the use and enjoyment of its property, during the period covered by the declaration, and it is not necessary that the jury should be able to fix the damages with absolute certainty, but they may assess the damages acting as fair men in such sum as in their judgment will compensate plaintiff for the injuries it has sustained.

Given & ex.

W.

5. If the jury find from the evidence that the defendant or its agents did store or park freight cars in great numbers on its tracks, sidings and switches in and on the public reservation highway or street formed by the converging of Maryland Avenue, Virginia Avenue, C Street and 8th Street between Seventh and Ninth Street-Southwest in the City of Washington, District of Columbia in front of and near the property owned and possessed by the plaintiff; and

95      did suffer the same to remain there for an unreasonable length of time, and that there was want of reasonable care

on the part of the defendant for the plaintiff's right of enjoyment and use of its said property by the use of locomotive engines propelled by steam to make up and break up freight trains and other trains on said tracks, sidings and switches, and did cause to be made and kept large and injurious fires in said engines, and that thereby large quantities of offensive and unwholesome smoke, soot, steam, vapors and other gaseous substances issued and proceeded from *from* said engines and passed over and into plaintiff's building and premises, to the special inconvenience, annoyance and discomfort of the plaintiff from November 5, 1903 to November 5, 1906, the jury may award such damages to the plaintiff as the jury may deem reasonable and just for the special inconvenience, annoyance and

discomfort of the plaintiff, in the use and enjoyment of said building and premises, and for injury to the plaintiff's business as the plaintiff may have sustained from November 5, 1903 to November 5, 1906.

Given & ex.

W.

6. If the jury find from the evidence that the defendant, or its agents, did park or store freight cars or other cars in great numbers on its tracks, sidings and switches in and on the public reservation formed by the converging of Maryland Avenue, Virginia Avenue, C Street and Eighth Street between Seventh and Ninth Streets, Southwest in the City of Washington, District of Columbia in front of and near the building and premises of the plaintiff and did unreasonable suffer and permit loud and disagreeable sounds and noises on and about said tracks, switches and sidings, including the rumbling and jarring of locomotive engines freight cars and other cars, including the whistling of said engines and the escape of steam therefrom and the ringing of the bells thereof, and including the loud and boisterous shouting of the servants, agents and employees of the said defendant; and did unreasonable suffer

and permit disagreeable, offensive and noxious odors and  
96      smells to proceed from freight cars and other cars stored

and parked and shifted back and forth over and upon the said tracks, sidings and switches, over and unto plaintiff's said building and premises; to the special inconvenience, annoyance and discomfort of the plaintiff and to the injury of the plaintiff in its business from November 5, 1903 to November 5, 1906, the jury may award such damages to the plaintiff as the jury may deem reasonable and just for the special inconvenience, annoyance and discomfort of the plaintiff in the use and enjoyment of said building and premises, as the plaintiff may have sustained from November 5, 1903 to November 5, 1906.

Given & ex.

W.

7. If the jury find from the evidence that the defendant, or its agents, did park or store freight cars or other cars in great numbers on its tracks, sidings and switches in and on the public reservation formed by the converging of Maryland Avenue, Virginia Avenue, C Street and Eighth Street between Seventh and Ninth Streets, Southwest in the City of Washington, District of Columbia, in front of and near the building and premises of the plaintiff and did unreasonably and improperly use portions of said public reservation and streets in which to unload freight and did by the passage and repassage of locomotives engines and cars, and by the standing thereof at and upon, over and across the pavements, and sidewalks of said Seventh Street and Ninth Street, Southwest, and other streets, block up and close for a long and unreasonable periods of time said Seventh and Ninth Streets and other streets over which many of the persons living in the plaintiff's building and many of the schol-

ars attending the plaintiff's seminary were obliged to pass and repass in order to gain access to and egress from the building of the plaintiff to the special inconvenience, annoyance and injury of the plaintiff in the use of its said building and premises as a seminary and boarding house from November 5, 1903 to November 5, 1906, the jury may award such damages to the plaintiff as the jury may deem reasonable and just for the special inconvenience, annoyance and injury as the plaintiff may have sustained from November 5, 1903 to November 5, 1906.

Refused & ex.

W.

Which instruction was refused by the Court, to which action counsel for the plaintiff reserved their exception, which was noted by the Court on its minutes.

8. If the jury find from the evidence that the defendant, or its agents, did park or store freight cars or other cars in great numbers on its tracks, sidings and switches in and on the public reservation formed by the converging of Maryland Avenue, Virginia Avenue, C Street and Eighth Street between Seventh and Ninth Streets, Southwest in the City of Washington, District of Columbia in front and near the building and premises of the plaintiff and did so unreasonably use its said tracks, sidings, switches, cars and locomotives as to greatly jar the walls of the plaintiff's said building and to cause the plaster on the walls to crack, loosen and fall, necessitating repairs and to cause large quantities of offensive and unwholesome smoke, steam, soot, vapors, and other gaseous substances to enter the windows and doors of the building of the plaintiff and to spread and diffuse themselves in, upon and throughout the same to the special inconvenience, discomfort of the plaintiff, its superintendant, teachers, attendants and pupils in attendance and to the injury of the furniture in said building and other belongings of the plaintiff therein; and to make access to and egress from said building difficult and dangerous; and that thereby many persons were deterred and prevented from attending said seminary who would otherwise have done so, and that thereby many persons who had been in attendance ceased to attend said seminary, to the special injury of the plaintiff from November 5, 1903 to November 5, 1906, the jury

may award such damages to the plaintiff as the jury may 98 deem reasonable and just for such special injury as the plaintiff may have sustained from November 5, 1903 to November 5, 1906.

Refused & ex.

W.

Which instruction was refused by the Court, to which action counsel for the plaintiff reserved their exception, which was noted by the Court upon its minutes.

9. The jury are instructed that the plaintiff had the same right to the enjoyment of its premises for seminary and boarding house

purposes that a private gentleman has to the comfortable enjoyment of his own house and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. 108 U. S.

Given & ex.

W.

10. The jury are instructed that the defendant's rights to operate its road can not be said to have been reasonable, if such operation deprived the plaintiff of the lawful use and enjoyment of its property, without regard to where defendant operated its road, and although the operation may have been lawful and useful to the public and the best and most approved appliance and methods may have been used. 75 Md. 616.

Given & ex.

W.

11. If the jury find for the plaintiff under the instruction given, then the proper measure of damages is such sum as will reasonably compensate plaintiff for the deprivation of the beneficial use and occupation of its property and for such molestation, annoyance and disturbance in the enjoyment of its premises as it has suffered, if any, by the acts of the defendant. 2 App. D. C.

Given & ex.

W.

12. If the jury shall find for the plaintiff, they may determine the extent of the injury and the equivalent damages, in view  
99 of all the circumstances of such injury, and of interference with the uses to which plaintiff's property was devoted during the period claimed in the declaration, and of all other particulars, if any, where plaintiff is shown to have been injured during said period, for which, under the instructions of the Court, the plaintiff is entitled to recover. 108 U. S.

Refused & ex.

W.

Which instruction was refused by the Court, to which action counsel for the plaintiff reserved their exception, which was noted by the Court upon its minutes.

Thereupon counsel for defendant offered six instructions all of which were refused by the Court.

The Jury are instructed that the defendant railroad company was duly authorized by various Acts of Congress of the United States to construct, maintain and operate its main running tracks on Maryland and Virginia Avenues between Seventh and Ninth streets in front of the plaintiff's premises and was authorized and empowered to operate its freight and passenger trains thereon by means of steam locomotives, and to stop such trains for such periods of time as the necessities of its business might require, and if the jury shall find that the defendant company operated its trains and engines over

said tracks with reasonable care and that the annoyance, inconvenience and damage of which the plaintiff complains resulted from the smoke, dust, cinders, noises, rumblings and jarrings necessarily produced by said locomotives and trains while being so operated, then the plaintiff cannot recover in this action and the verdict should be in favor of the defendant.

(B. & P. R. R. Co. v. Fifth Baptist Church, 108 U. S. 331).

Refused & ex.

W.

100

II.

The jury are instructed that the United States is the owner of the streets and street reservations in the City of Washington in the District of Columbia, including reservation No. 113 in front of the plaintiff's premises, and that by Act of Congress said reservations constitute a part of the park system of the District of Columbia in the exclusive charge and control of the Chief of Engineers of the United States Army under regulations prescribed by the President of the United States through the Secretary of War, and if the jury shall further find from the evidence that on or about December 15, 1904, the Secretary of War issued a license to the defendant company to temporarily place four side tracks upon reservation No. 113 between Seventh and Ninth Streets and Maryland Avenue and C Street to enable the defendant company to furnish safe and adequate accommodations for and to facilitate the delivery of large quantities of building material and other freight intended for use in the construction of the new building for the Department of Agriculture, the National Museum and the Municipal Building of the District of Columbia, then in course of erection, and that subsequently and on or about June 2, 1905, said license was extended to authorize the use of said side tracks for the unloading and delivery of building material and other freight for the War College and the U. S. Senate and House of Representatives Office Buildings, and if the jury shall find from the evidence that the defendant company made use of the sidetracks upon the said reservation for the said purpose and paid rent for such privilege to the Government of the United States at the rate of \$1375 per annum in accordance with the terms of said license, and if the jury shall further find that the noise, smoke, dust, annoyance and inconvenience of which

the plaintiff complains resulted wholly or in large part 101 . the use so made of said reservation tracks and the shifting

operations required to place cars in position upon said tracks for unloading, then the jury are instructed that the plaintiff is not entitled to recover in this action for the annoyance, inconvenience and discomfort in the use of its premises resulting from said use of said reservation.

Refused & ex.

W.

## III.

The jury are instructed that the plaintiff is not entitled to recover damages of the defendant company for any annoyance, inconvenience or discomfort which may have resulted from the reasonable and necessary operations of the tracks in front of its premises between Seventh and Ninth Streets in connection with the freight station of the defendant company located at Ninth — and Maryland Avenue or with the passenger station of the defendant company on Sixth Street or in connection with the said tracks on reservation No. 113, or in connection with the movement of construction and material trains necessarily operating along said tracks in front of said premises in connection with the making of the improvements between the Long Bridge and the Navy Yard Tunnel authorized and required by the Acts of Congress of February 12, 1901 and February 28, 1903.

Refused & ex.

W.

## IV.

The jury are instructed that under the pleadings in this case plaintiff is not entitled to recover any damages for annoyance, inconvenience or discomfort caused by the unloading of excursionists on the tracks between Seventh and Ninth Streets in front of the plaintiff's premises.

102

## V.

The jury are instructed that if they should find that the plaintiff is entitled to recover damages in this action such damages, under the pleadings and evidence in this case, should be confined merely to nominal damages.

Refused & ex.

W.

## VI.

The jury are instructed that before the plaintiff can recover damages in this action it must establish by a fair preponderance of the evidence that the annoyance, inconvenience and discomfort which it claims to have sustained in the comfortable use and enjoyment of its premises *was* caused wholly by unreasonable, improper and unlawful operations of the defendant company in front of its said premises, and if the evidence leaves the matter in doubt and the jury is unable to distinguish the smoke, soot, cinders, odors, noises and other disturbances which resulted from the lawful, reasonable and proper operations in front of the said premises from that which resulted from the alleged unlawful, unreasonable and improper operations in front of said premises, then their verdict must be in favor of the defendant company.

Refused for & use of word "fair" & ex.

W.

103 Whereupon the Court upon its own motion charged the jury as follows:

*Charge to the Jury.*

Gentlemen of the jury, the fact that the Government of the United States, through its proper officer the Secretary of War, granted authority to the railroad company to use the public square known as Square No. 113, and also the fact that the sovereignty of the United States, through its legislative body, Congress, by certain laws, authorized the railroad company to use the public streets which have been identified in the evidence, renders it desirable that you should be pointed to those considerations which shall accurately guide you in determining how far, under the authority given either by permit of the Secretary of War or by the Act of Congress, the operations of the railroad company are protected by that authority, from any complaint against the railroads urged by an individual private citizen; and that, I think, you can be made to clearly understand, after a moment's consideration and reflection.

We must look at the distinction, which will at once present itself to your minds when suggested, between public rights and private rights, and public property and private property. The Government of the United States may make whatever disposition pleases it of public property and of public rights. The Constitution of the

United States prohibits even the United States itself from  
104 making any disposition of private rights without compensation is first made, in advance.

Square No. 113 was public property, and therefore the United States could dispose of the interest of the public in that property. The streets on either side were public streets and belonged to the Government, and the Government might authorize a railroad company to make whatever use the railroad company chose to make of those streets, and in so far as the use which the railroad company chose to make of Square 113 or the public streets affected no other property rights except the property rights of the public, that is to say of the Government, then they were justified; but, if, in the use of the public property under public authority, the railroad company, in its operations, affected private property rights in making the use which the Government authorized of the public property then no permit of the Secretary of War and no legislative act of even Congress can protect the railroad company against the claims of the private property owner who is able to show that his private rights, as distinct from public rights, were invaded by the operations of the railroad company.

Before I point out in further detail the nature of private rights, to the extent that they are involved in this inquiry, I want to eliminate from the elements of the damages properly to be awarded by you, one consideration that has not yet been specifically pointed to by counsel for either of the respective parties.

I have already said to you that the streets were public property, and that rights in the streets were subject to be disposed of  
105 by the public, through the officials, either executive or legislative, having the matter of streets in charge.

Now, there is a marked distinction between the right which every individual citizen has because he is a part of the public entity, (not because he is an individual), to use the streets as avenues of passage. There is a difference between the right which the individual member, as a part of the public, has to use the street to pass back and forth, and the right which the property owner has, who owns property abutting on the street, to go in and out of his property, from the street. If there is such use made, even under public authority, of the street as that it interferes with the access that a particular owner of real estate which abuts on that street has a right to demand in the street, then that is an interference with his property right, which no public authority can justify. But if there is an interference in the use of the street, which simply prevents passage back and forth over the street, from one part of the street to another part of the street, then that is not an invasion of anybody's private rights, because the right to use the streets is not a private right, but is a public right, and belongs to the individual not as a private person but as an integral of the great public entity.

Therefore, while there is evidence in this case which tends to show that 7th Street was blockaded at times, so that people could not get across the tracks, yet there is no evidence which tends to show that the blockading of 7th Street actually impeded the right

which the plaintiff had to get in and out of its property from  
106 the street. Therefore the only result of the blockading of

7th street was a result which would prevent the passage from one part of the street to another part of the street, as distinguished from preventing passage from the street on to the real estate of the plaintiff, and therefore, for that item there can be no recovery in this case, because the injury was to the public, if any violation there was of a public right, and not to a private right, and nobody can complain about it on his private account.

Now, let me point out in more detail than I have yet proceeded to, the nature of the rights of private property owners, because the expression "property" as used in the law, contemplates more than mere physical things. It contemplates that intangible and unphysical right to make enjoyment or to make use of physical things as well as to own them. The right to use one's property, for whatever lawful purposes he desires to use it, whether it be real property or personal property—that very right to use, is property, and when the Constitution of the United States provides, as it does, that private property shall not be taken for public use without just compensation, it means that if the operations of either a railroad company or the public itself, or private citizens, are of such nature that they interfere with the right that another citizen possesses to use his property, that that is a taking of his property, either in whole or in part, in accordance with whether the right to use is totally or in part violated.

When I say the right to use is violated, I mean to have  
107 your minds draw this distinction: that the phrase, "taking  
of private property" means more than such a mere effect as amounts to no more than annoyance in the use, as distinguished

from an effect which amounts to so great an annoyance as that it lessens the value of the right to use.

Therefore, if you find that the railroad company, in its operations, either on the streets or on square 113, or both, affected the property rights that the plaintiff had to make use of this property, as I have described, then to whatever extent that private right of property was affected the plaintiff has a right to recover under the provisions of the Constitution, from the defendant railroad company.

I shall not go into any detail, in my own language, on the subject of the elements of damage, for the reason that counsel for the plaintiff have availed themselves of the privilege which the law gives them, to have prepared, in their own language, the phraseology that shall cover subjects, provided they remain in the bounds of law. They have seen fit to adopt phraseology within the law, and such as correctly describes the law for the measure of damage in such cases. In the special instructions which have been read to you by counsel, you will find, in what further detail is necessary, the elements of damage which are proper to be considered by you in the determination of the question.

You may take your exceptions.

Mr. FLANNERY: In the first place I would like to reserve again my exception of the refusal to the Court to direct a verdict in our favor, for the reasons already given in argument.

108 I would like to reserve exceptions to the refusal of each of our prayers which have been refused and to the granting of each of the prayers on behalf of the plaintiff which were given.

At this point I desire to specifically refer and reserve an exception to so much of the oral charge as refers to the respective rights and duties of the plaintiff and defendant in this case and says that the authorization of the railroad upon the streets of the City of Washington under that authorization or upon this reservation, because among other things, your Honor, it seems to me, has not stated to the jury the doctrine of damnum absque injuria, set forth in the Fifth Baptist Church Case.

Mr. WILSON: The charge is perfectly satisfactory to us. We have no exceptions.

Thereupon the jury retired and returned a verdict for the defendant.

Be it remembered that each of the separate and several exceptions taken by counsel for plaintiff to the rulings of the Court as to the exclusion and admission of evidence, the substance of the whole evidence being hereinbefore set forth in this bill of exceptions, and the rulings of the Court in refusing the instructions to the jury, were so taken by counsel for plaintiff then and there, before the jury retired, separately and severally, and said exceptions were then and there separately and severally duly noted upon the minutes of the Justice presiding at the trial, and counsel for the plaintiff then and there prayed the Court to sign and seal this bill

109 of exceptions, to have the same force and effect as if each of said exceptions were separately and severally set forth in a separate bill of exceptions; and at the request of counsel for

of the claimant  
Congress does not constitute a defense

plaintiff the same is accordingly signed and sealed and made a part of the record in the cause now for then, this 1st day of March, 1910, as and for the 23d day of Feby., 1910, the date on which said bill of exceptions was submitted to the Court.

DAN THEW WRIGHT, *Justice.* [SEAL.]

Settled by consent February 25, 1910.

WILSON & BARKSDALE,  
*Att'ys for Plff.*  
 McKENNEY & FLANNERY,  
*Att'ys for Def't.*

110

*Memorandum.*

March 18, 1910.—Time to file record in Court of Appeals extended to, and including, April 14, 1910.

*Directions to Clerk for Preparation of Transcript of Record.*

Filed March 23, 1910.

\* \* \* \* \*

The Clerk in preparing the transcript of record will embody the following, viz:

1. The Plaintiff's Declaration.
2. The Defendant's Pleas.
3. The Plaintiff's Joinder in Issue.
4. Memo.; Verdict of Jury.
5. Motion for New Trial.
6. Continuances of Motion for New Trial.
7. Overruling New Trial, Judgment on Verdict, appeal noted and bond fixed.
8. Memo.; Bond filed.
9. Bill of Exceptions.
10. Designation of record.

HENRY H. BOWMAN,  
 WILSON & BARKSDALE,  
*Attorneys for Plaintiff.*

111              Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 110, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is

made part of this transcript, in cause No. 48913 at Law, wherein Academy of the Sacred Heart of Mary, a corporation, is Plaintiff, and Philadelphia, Baltimore and Washington Railroad Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 11th day of April, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2150. Academy of the Sacred Heart of Mary, a corporation, appellant, vs. Philadelphia, Baltimore and Washington Railroad Company, a corporation. Court of Appeals, District of Columbia. Filed Apr. 12, 1910. Henry W. Hodges, clerk.

COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

~~OCT. 11. 1910~~

*Henry W. Hodges.*  
*Clk.*

# Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

—  
No. 2150.  
—

ACADEMY OF THE SACRED HEART OF  
MARY, A CORPORATION, Appellant,

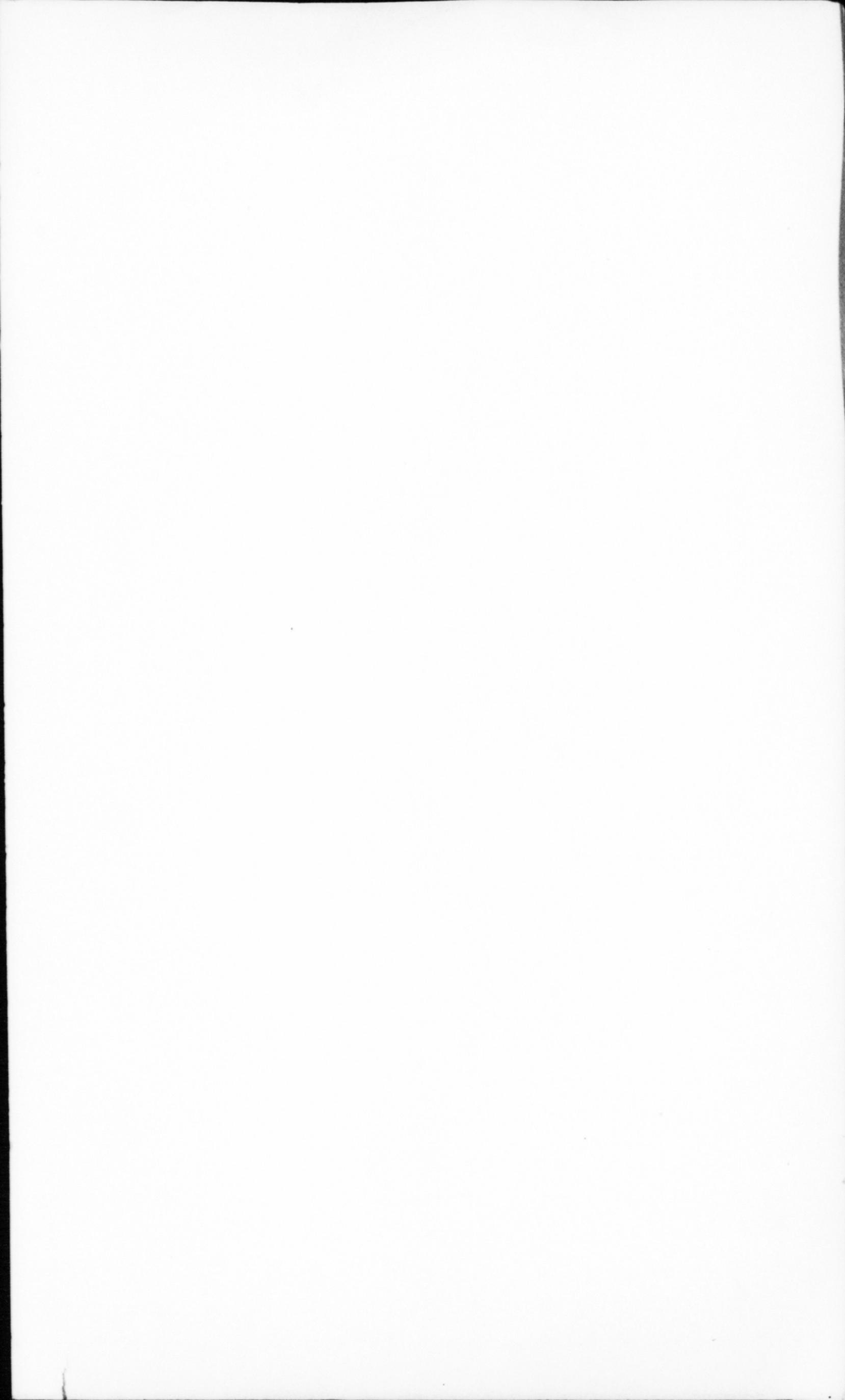
vs.

PHILADELPHIA, BALTIMORE & WASHINGTON  
RAILROAD COMPANY, A CORPORATION.

## — Brief for Appellant.

ANDREW WILSON,  
NOEL W. BARKSDALE,  
*Attorneys for Appellant.*

HENRY H. BOWMAN,  
*Of Counsel for Appellant.*



IN THE  
**Court of Appeals, District of Columbia.**

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ACADEMY OF THE SACRED HEART OF MARY,  
A CORPORATION, *Appellant,*

*vs.*

PHILADELPHIA, BALTIMORE & WASHINGTON  
RAILROAD COMPANY, A CORPORATION.

} No. 2150.

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**BRIEF ON BEHALF OF APPELLANT.**

This is an appeal from a judgment entered below on the verdict of the jury in favor of the defendant.

**Statement of Case.**

The plaintiff filed its declaration, alleging that it is a corporation, organized for the purpose of conducting a seminary for the instruction of children and young ladies, and as such owned 21,226 square feet of real estate in the City of Washington, located at Eighth and C Streets Southwest, whereupon it had erected a building to be used as a seminary and a boarding house and residence for its teachers and attendants, and that between November 5, 1903, and November 5, 1906, said building was being used for the aforesaid purposes; that during said time the defendant unlawfully maintained immediately in front of said prem-

ises a large number of railroad tracks, sidings and switches, upon which it improperly stored and parked its cars in great numbers and used its said tracks, sidings and switches at all hours of the day and night, propelling over them by steam its locomotive engines together with its cars, making up and breaking up its trains, and unlawfully converted that part of public reservation, highway or street into a freight yard and improperly and unlawfully moved and propelled its locomotive engines and cars back and forth over and upon its said tracks, sidings and switches, day and night, and kept in its said locomotive engines large and injurious fires, and did cause to issue and proceed therefrom and to pass over into the plaintiff's premises large quantities of offensive smoke, soot and gaseous substances; and also unlawfully and improperly caused, suffered and permitted loud and disagreeable sounds and noises, including the rumbling and jarring of defendant's said engines and cars on said tracks, sidings and switches, and including the whistling of said engines, and the escaping of steam therefrom and ringing the bells thereof, and including the loud and boisterous shouting of the servants, agents and employes of the defendant; and did improperly and unlawfully suffer and permit disagreeable, offensive and noxious odors and smells to proceed from freight and other cars, stored, parked and shifted back and forth over said tracks, sidings and switches; and also permitted its freight to be unloaded upon said street, permitting its cars to stand in front of and near the premises of the plaintiff an unreasonable length of time; by which the persons living in the plaintiff's house as boarders and scholars attending the seminary and also the teachers, were molested, annoyed, disturbed and the plaintiff was deprived of the use of its building and premises for all the purposes for which it was established, at times when the sessions of the seminary were held and also annoying and

molesting those occupying the said building and preventing them from enjoying the same and the attendance of the seminary was decreased thereby; and the building was greatly injured by said acts of the defendant, causing the plaster to crack, to loosen and to fall, necessitating repairs and injuring furniture and other belongings of the plaintiff in said building; and that the plaintiff was damaged by reason of the said improper and unlawful acts in the sum of \$25,000.

The defendant pleaded not guilty.

Trial was then had before a jury and testimony adduced on both sides.

The jury returned a verdict in favor of the defendant.

This Honorable Court will not disturb the finding of fact by the jury. It is proper to consider the facts in so far as the law was applied to them in the trial Court. If erroneous rulings of the Court influenced the jury or might have influenced the jury to return a verdict for the defendant it would seem an examination of the facts would be proper to ascertain whether the jury were so influenced. With that in view a brief review of some of the testimony is presented and is considered important.

### **The Testimony.**

The Academy of the Sacred Heart of Mary was incorporated in 1870 by the Dominican Order of Sisters and in that year acquired the western half of square 434 in the City of Washington. The property so acquired fronts 99 feet 8 inches on C Street Southwest, and for that distance directly faces the tracks of the defendant. The school and religious community then established by the Sisters at this place prospered and in 1876 a new building was added, known as the

west wing. This building is 36 feet by 80 feet or 85 feet and is three stories and a basement high (R. 20).

The plaintiff corporation was formed by the Sisters "For religious and educational purposes and for the purpose of establishing an institution of learning in the City of Washington, District of Columbia, for the education of young ladies in the higher branches of learning taught in first-class schools for young ladies \* \* \*. The particular business and objects of the said Society or Institution of learning are to give to young ladies the advantages of a first-class educational institution, and the particular branches of literature proposed to be taught are the following: General Literature, Mathematics, Natural Science, History, Languages, and the ordinary branches of English, together with music and painting; also the advancement of the incorporators themselves in religion and charity." The Academy is not to be of the rank of a College or University (R. 11, 12).

From 1903 the number of pupils was from 80 to 85 and from 1904 to 1906 the number did not vary more than 10 in a year (R. 38). About fifteen Sisters lived in the community at the Academy. In the summer about four went away on vacation.

At that time reservation 113 was not used for railroad purposes and there was probably but one track in 1877 on the streets and avenues fronting this property (R. 52). The trains were few. More tracks were added and finally in the latter part of 1904 or early part of 1905 the defendant used the Government Reservation 113 in front of the Academy for railroad purposes.

Every three minutes for the twenty-four hours there averaged more than one movement in front of the Academy by an engine with or without cars attached. Engines and cars were parked there not from necessity, but for the convenience merely of the defendant.

After showing title to its property and that the nearest track of the defendant to the plaintiff's property is 90 feet away, and the most remote in front of said property is 285 feet approximately with numerous tracks and sidings intervening (R. 37) the plaintiff produced sixteen witnesses. The Special Agent of the defendant testified that from November 5, 1903, to November 5, 1906, the defendant was operating both passenger and freight trains over said tracks and that he knows the defendant sent over them as many as 20 freight trains per day, possibly 40 or 50 per day (R. 37). Another witness for defendant, who, during the period covered by the declaration was passenger and freight trainmaster for the defendant testified that there were "over five hundred movements in both directions in the twenty-four hours" on the tracks in front of the plaintiff's property (R. 39). According to the testimony of the Freight Agent of the defendant during the time covered by this action there were four tracks on Virginia Avenue, three on Maryland Avenue and four on Reservation 113—making eleven tracks in all in front of the property of the Academy of the Sacred Heart of Mary.

Counsel for defendant admitted that the tracks between 7th and 9th streets, both side-tracks and main tracks, were maintained, and to a large extent operated by the defendant in this case and that they were the tracks of the defendant company. It was admitted that there was a .73 per cent grade from 7th to 9th street.

The plaintiff's witnesses, it would appear, conclusively proved that the operations of the defendant so seriously interfered with the use and enjoyment of its property that recovery of damages would have been proper in this case if recovery could be had in any case.

## Nature and Extent of Nuisance.

### 1. *Smoke, soot and gases.*

MILLARD F. THOMPSON, M. D., testified that he has been a physician in Washington since May, 1884, and resides at 484 Maryland Avenue Southwest; that he was familiar with the conditions which existed in front of plaintiff's property from November 5, 1903, to November 5, 1906; that he is connected with the South Washington Citizens' Association; was on the smoke committee; that the smoke from Southern engines came up there and those on the other roads that burnt soft coal, and make it almost impossible to see a house in that neighborhood at certain times. They would fill the house with smoke from switching engines so that you could hardly stay in a house along that line, particularly where so many engines were stopping. If the wind blew from the north it enveloped the whole place and you could not keep the windows open. Whenever it blew from the northwest, north or northeast that smoke was carried through the property of the Academy of the Sacred Heart of Mary. The shifting engines used coke, but the other engines, especially those going up hill that had to go in and out especially from the South burned soft coal. Gases always accompanied the smoke. The property from 7th street to 9th street was used particularly to house engines there, for the trains to go out. At midnight he had seen from three to five engines there blowing off steam and smoke at the same time, and if you go past there you could hardly hear yourself talk because of the rattling noise. It was almost intolerable. That would go on sometimes all night. Witness was through there four or five times from morning to morning at midnight and day-time. The smoke nuisance and the blowing off of steam was terrible and not to be described. Those engines were directly

in front of the Academy of the Sacred Heart of Mary (R. 15-16).

JOSEPH B. BAILEY, engaged in real estate, pensions and patents business, testified that he has resided about 20 years at 413 6th street southwest, and that he is familiar with the conditions existing November 5, 1903, to November 5, 1906, on the Philadelphia, Baltimore & Washington Railroad in front of or near the said Academy. He passed the place once every day, sometimes oftener. He has seen the smoke there so dense from engines that you could not see a house across the street. He saw such conditions daily within the period designated. All kinds of freight and passenger cars were in front of the Academy. When the wind was from the north, northwest or northeast it carried smoke and gases to the houses south of the tracks and injured carpets, walls, furniture and anything (R. 17).

JOHN P. SULLIVAN testified that he has been a druggist at 7th and D Streets Southwest, for more than 13 years, and for about a year, 1905, lived at 703 C Street Southwest, facing Reservation 113. The Reservation was used as sort of a freight yard. There were locomotives usually blowing off steam, emitting heavy black or gray smoke, sometimes in large quantities and if the wind was from the northwest, north or northeast the smoke would be carried in the direction of the Academy.

JOHN D. WRIGHT testified that he has lived at 496 Maryland Avenue Southwest for 15 years. He is a retired merchant. He is familiar with the operations of the railroads in the vicinity of the Academy. He passed there one-half dozen times a day, sometimes more. Frequently two, three

or four engines at a time were on those sidings and tracks in front of the Academy. Smoke and soot were almost unbearable around there almost continually. The nuisance from smoke, soot and gases was something unbearable both day and night. He passed there as late as eleven or twelve o'clock at night frequently. The Academy was affected by smoke, cinders and gases coming in through the open windows (R. 89-90).

BERNARD LEONARD testified that he has been in the real estate business about 22 years and his office is 522 4½ St., S. W., and was acquainted with the conditions of the railroad traffic in front of the Academy of the Sacred Heart of Mary from November 5, 1903, to November 5, 1906. Sometimes the smoke was very dense. If the wind blew from the northwest it would certainly go over toward the Academy. There were a great many freight and passenger trains and all caused noise, smoke, soot and cinders (R. 20).

MICHAEL A. KELLY testified that he has lived in the vicinity about 20 years. During the period he saw shifting engines make smoke and cinders and the wind from the north or west blew it right on the Academy. All the trains passing there would make smoke and dust. Then there were two engines to pull up that grade; they made more noise and smoke and dust (R. 20).

ROBERT O'NEILL testified that he lived at 479 F St. Southwest, and is a retired builder. He has been acquainted with the building and premises of the plaintiff since 1876, when he built the west wing, which is about 36 by 80 or 85 feet, and is three stories and a basement. He was often on and near this property. If the wind was blowing brisk at all he could not see across the street (R. 22).

MAURICE FITZGERALD testified that he has resided in this section of the city for 40 years. He has been a real estate agent 16 years and before that was a grocery and provision dealer and contractor. He has been familiar with the Academy of the Sacred Heart of Mary for 40 years. He knows the Sisters have been in possession of the property for 25 or 30 years and is familiar with the conditions from November 5, 1903, to November 5, 1906, on Reservation 113, as far as the same related to railroad traffic. There were volumes of smoke continually emanating from engines. They would go puff, puff, puff, and send forth large volumes of smoke. All of the smoke emanating from these engines as they lay on the tracks blew directly against the Academy. The only chance they had to escape was when the wind blew from the south (R. 23-24).

SISTER MARY PHILIP SWEANY testified that she is connected with the Academy of the Sacred Heart of Mary as a teacher and during the period of this suit was a resident of the Academy continuously. She observed the conditions with respect to the operation of the railroad. She noticed the smoke very clearly and experienced the heavy smoke coming into the school room. She was prefect of the study hall during part of that period, and at times when she had to hear recitations a few feet from her desk there was a window which she never opened because of the noise and dust. Frequently she lowered the windows to prevent the heavy cloud of black smoke from coming into the room. Frequently the windows had to be closed when the heavy smoke came (R. 24). It came from the engines into the Academy. The closing of the windows did not exclude all of the smoke as was very apparent from the furniture and the open pianos which suffered from it. The furniture could be dusted several times a day and would not be overdusted. If they went

to get a few volumes from the library that had not been changed for a time and took them to the school room their fingers would be covered with black as from articles exposed to soot. The same is true with books which were taken from the study hall to the library, and with other articles that were handled. These conditions existed during the period, but grew worse (R. 25).

E. J. BURT testified that he lives at 714 B St., S. W., and conducts a newsstand and notion store at 405 7th St. S. W. He has resided in this section about 40 years. During the period he was familiar with the conditions regarding the use of Reservation 113. He had occasion to pass there eight or ten times a day, and also at night, as he closed up at ten o'clock. The conditions were very bad. He has seen five engines standing between 7th and 9th streets at one time and at least three of them blowing off steam at the same time. Usually black smoke came from the other two. If the wind was north, northeast, or northwest it would drive the smoke towards the Academy. It was thick black smoke (R. 28).

SISTER ELIGIUS MARGARET MATTHEWS testified that she was a resident of the Academy during this period and was there the entire day for about a year and two months and for the remainder of that period she remained at the Academy from 4:30 p. m. until 8:00 o'clock the next morning. Between 8:00 o'clock in the morning and 4:30 she was at St. Dominic's School, 6th and F Sts. S. W. There were eight or nine Sisters teaching at the Academy at that time who were not teaching at parochial schools and who remained at the Academy over night, and those who taught at parochial schools were there over night also. There were 14 or 15 Sisters remaining at the Academy during the nights of that period. She observed the conditions and has gone

around the house and closed the windows along the side of the house when the smoke came in that direction (R. 29-30). As time went on smoke and dust also increased. She counted the trains that went into the station and those that went in front of the Academy, making and breaking up of freight trains, and counted about 27 times in an hour and a half.

The use of the tracks was practically continuous during the daytime in front of the Academy of the Sacred Heart of Mary (R. 31).

SISTER MARY EVELYN MURPHY testified that during this period she was a resident at the Academy and had occasion to notice the conditions caused by the operating of the railroad very minutely. She was teaching in two rooms between which she divided her time. Both were in the immediate front of the building. The windows overlooked the tracks of the railroad (R. 31). Clouds of heavy black smoke loaded with dust and cinders came in the direction of the building and in through the windows of the building so much that the windows had to be closed in the summer time, and even when the windows were closed some of the soot penetrated, so that frequently the sills of the windows were obliged to be swept on account of the soot that collected there. The clothing and furniture within the house were in bad condition from the effects of it. The smoke circled around the house and into the back yard, and the laundry on the line would be soiled from it, particularly in the rainy season when the soot would settle and the water coming in contact with it would make it very disagreeable. The smoke that entered the Academy building was very offensive, it was gaseous. In many instances it would give you strange feelings in the nostrils and throat when it entered. It was a very unusual thing for the steps in front of the

building to be entirely free from the standing of cars. Only once she remembers that they were entirely free. On account of the engines standing and giving off gas and smoke the windows had to be closed (R. 32). A great number of trains passed in a day on the main tracks, and made smoke and dust.

SISTER ASSENTA DOYLE testified that she has been a resident of the Academy of the Sacred Heart of Mary for over 18 years continuously. She was teaching regular classes and observed the conditions occasioned by the operation of the defendant's railroad during this period (R. 33). There was scarcely any time during the day in which the cars were not standing in front of the building. Sometimes with engine and sometimes without. Cars were made up into trains. She has seen two and sometimes three engines standing together there for five, ten, fifteen and twenty minutes. Not all for twenty minutes, but one or two for that length of time. The smoke was heavy and gaseous. The gases were really more offensive than the smoke as they permeated the building and were very offensive. The gases were those naturally coming from soft coal. Smoke troubled them when a freight train would pass. It was worse during the rainy season. It seemed to remain in the locality. In summer the windows on the north side were frequently obliged to be closed on account of the smoke and dust, and that was especially so if the wind was from the north, northeast and northwest (R. 34).

SISTER MARY EUGENE CONDON testified that she was a resident of the Academy during the period covered by this case. She taught in the daytime at St. Dominic's School and was away from the Academy from 8 a. m. to 4:30 p. m. The remainder of the time she was at the Academy. She

observed the conditions arising from the operations of the railroad in front of the building (R. 35). She cannot give an idea of the number of freight and passenger trains as they were always going and made a great deal of smoke and dust.

## 2. *Noise.*

DR. THOMPSON testified that at midnight he has seen from three to five engines there blowing off smoke and steam at the same time, and if you would go past there you could hardly hear yourself talk because of the rattling noise. It was almost intolerable. That would go on sometimes all night. The smoke nuisance and the blowing off of steam was terrible and not to be described. Trains were made up on these side-tracks. They would be driven in there and have big stone on them, about four by six cube, and they would make that bumping noise in the yard. There was a certain shock to it. That happened all through the yard. They did this bumping particularly all through the night. Stone, girders, coal and building material were on the cars and were unloaded there. Derricks were used and made a noise in moving, bumping and depositing material. The crossing was so dangerous that you had to watch out for your life and see that you did not get caught between the cars. You had to take your chances between bumps even though they had gatemen and watchmen. At 7th Street you would stay from five to fifteen minutes in passing, especially in the morning when the children were going to school (R. 16). The combination of noises in unloading, engines and blowing off of steam that was so bad. You could hear the shifting engines blowing off steam at three o'clock in the morning as well as eleven o'clock at night. The dropping

of a joist or beam would make a severe sound. In shifting, in connection with the freight station, they would bump along the cars, strike one at 11th Street and it would resound at this end and would keep on bumping along the whole line.

JOSEPH B. BAILEY testified that all kinds of freight and passenger cars were in front of the Academy. Part of the place was used in transit and part as freight yard. Stone, heavy beams, iron, bricks, building material and he thinks coal, were unloaded in different ways there. The unloading made noise. They made noises blowing off smoke and steam to such an extent that if two people were talking anywhere in the neighborhood they could not hear each other. Trains stalled there and would whistle for assistance time and again. The noise would almost be unbearable (R. 17).

JOSEPH P. SULLIVAN testified that large stone, iron girders and brick were unloaded with very much noise. It was a severe noise that could be heard sometimes for a couple of blocks. The reservation was used as sort of a freight yard. Locomotives were usually blowing off steam. The Crane operated made quite an amount of noise (R. 18).

JOHN D. WRIGHT testified that the noise was considerable on Reservation 113 nearly all the time during the unloading of large structural iron and other iron, heavy stone and coal. The siding was particularly filled up with cars of structural iron, stone, coal and brick nearly all the time. Backing, starting, shifting, breaking trains, cutting loose and switching cars made considerable noise. He has seen two or three locomotives at a time on those sidings emitting steam and

making noise. Stalled trains in front of the Academy caused a great deal of noise starting, rumbling and roaring. A great deal of noise came from movements of trains along the tracks along Virginia and Maryland Avenues (R. 19-20).

BERNARD LEONARD testified that he saw them unloading coal, heavy stone and iron, engines move cars and saw them puffing (R. 20).

MICHAEL A. KELLY testified that he saw freight cars stop in front of the Academy and unload stone, building material and brick.

ROBERT O'NEILL testified that the noise was immense, for there were all kinds of bumping. They did not spare any noise "nor spare nothing while they were going on with this work in the way of noise or in the way of dumping anything."

MAURICE FITZGERALD testified that the cars were also piled up on those two short squares. They seemed to be furnishing material, loading and unloading, sometimes by hand and heavy material by derricks. There were continual noises, such as dumping of heavy iron and the bustle and racket was made with shifting and shunting of cars and engines laying on the track there, blowing off steam, sometimes two or three engines at a time (R. 23).

SISTER MARY PHILIP SWEANY. Because of the noise, principally, she never opened the window at her right while in the study hall. It would be almost impossible for her to hear recitations had she kept that window open in the summer time. All kinds of noises that could be made with

steam were made there. Cattle cars stood in front of the Academy many mornings when they were taking their breakfast. Bellowing noises came from the cars. The steam made hissing, seething, very nerve-racking noises, especially when hearing recitations, sometimes recitations were stopped, even three times in half an hour, until the worst of the noise would pass away, but there was still noise. It had a very bad effect upon the younger pupils. It was difficult to hold their attention during the interruptions. Each separate interruption lasted a few minutes, enough for the pupils to get their attention away from the text. These interruptions to recitations happened week in and week out, month in and month out, each of the school days of the week—Monday morning to Friday evening (R. 25). During this period the commencement exercises had to be held elsewhere because of the noise and smoke. Speaking or elocution could not be heard because of the noise. The engines and trains made a noise all the time they were standing and in starting again—these terrific noises, puffing, she did not know how to describe them. The exercises could not be heard nor could a priest be invited to address the graduates because he could not be heard. Exercises were held twice daily in the chapel, but were interrupted. There were Sisters in the chapel—the room being about 60 feet long—who never heard the meditation read. Often the priest at the altar could not hear the server when she answered the response, and even the server could not hear the priest when he terminated a prayer which should be responded to. The school day began at 9 o'clock. "The religious exercises are a great part of our lives." These interruptions were continuous. There was occasionally an hour that was passably quiet, but they were rare. The school closed at 3 o'clock. The principal meal was at five o'clock and it is customary to have a reader read for the community

while they are partaking of this meal, and she seldom, if ever, read without interruptions, many interruptions during the time of the meal. After dinner hour and short recreation the chapel exercises began again and the interruptions were just as frequent as they were in the morning. When she first came to the Academy she thought she could not sleep at all because of those noises and interruptions. She did not know how she could stand it. When she could get a light sleep and awake from it the noises were still going on. The effect was to make her restless and she did not enjoy a refreshing sleep which she needed very much. When patrons or friends called at the Academy seldom could the conversation be continued without interruption. Heavy building materials brought on Reservation 113, large rocks, bricks, heavy beams, iron for use in building, were unloaded there for a long period of time. These conditions seriously injured the Academy. The Sisters have not been able to advertise their school. The Academy has always been equipped with good teachers, other equipments they can not have. Conditions grew worse so that they could not expand and fit the Academy as they would do. There was much shunting and knocking together and shifting of cars. The heavy trains caused a great deal of rumbling and jarring (R. 26, 27, 28).

E. J. BURT testified that the unloading of materials for buildings, particularly stone and iron, was very noisy. Frequently the beams would fall a distance of perhaps one or two feet against another iron beam, which would cause a noise which was very severe, especially to a nervous person. The noise of coupling would be quite severe, and the bumping of cars made a great deal of noise. The letting off of steam was quite a usual occurrence with the engines. He

has seen five engines standing between 7th and 9th Streets at one time and at least three of them blowing off steam at the same time (R. 28). Trains were sometimes blocked or stopped and when they started up it caused a great deal of noise and jarring and rumbling. Noise came from all the trains operating along these tracks between 7th and 9th Streets.

SISTER ELIGIUS MATTHEWS testified that the most objectionable feature was the loss of sleep suffered by the noise of the engines. Sometimes engines would come along and stand in front of the Academy, puff smoke, puffing and using steam and making the most exasperating noises, that it would almost set one wild. When you would think it was about time for those engines to move off another one would come along, stand there, and take up the work and go on with the same thing. The night noises were the most exasperating to her. Sometimes it would seem that the front yard of the Academy was turned into one vast barn-yard, animals would be there, and would stand in front of the building. You could hear the squealing of hogs and the bellowing of cattle. That happened both day and night. Trains loaded with animals stood there for considerable periods of time, three or four times a week. The loss of sleep occasioned by the noise caused witness to feel exhausted and tired out when she arose in the morning. The noises commenced before she went to sleep and there was no such thing as getting to sleep for a couple of hours. If they commenced afterward she was awakened and it was almost impossible to get sleep after that. Cars and trains were shifted back and forth in front of the Academy. These occurrences came along frequently (R. 30). The letting off of steam was one of the most annoying noises about the matter. Sometimes these engines that made much steam

were attached to trains and sometimes separated from them. The noises came whenever they were letting off steam and that was very frequently. The noises came from screeching and grinding of the wheels on the rails. Freight cars occasionally went off the track there. The children put their hands to their ears to keep the noise out because of the annoyance they suffered from it during the recitation. She counted the trains that went into the station and those which passed in front of the Academy, and the making up and breaking up of these freight trains that would pass with engines for one hour and a half and counted about 27 times. The use of the tracks was practically continuous during the daytime in front of the Academy but there were interruptions. In addition there was a great deal of noise, jarring and rumbling.

SISTER MARY EVELYN MURPHY testified that the windows overlooked the tracks of the railroad. The noise was very, very annoying. The seething and roaring steam; the ringing of bells and blowing of whistles by the engines, and making and unmaking of trains, causing a bumping of cars whenever they came together. The rumbling of the wheels; the materials that were unloaded from the cars coming in with heavy trains, all those things made a very serious noise, but particularly the switching in front of the Academy. They would interrupt the recitations very seriously. In the switching, when the cars came together there was a loud bumping noise. She noticed that in one-half an hour the work would be interrupted on an average of three or four times in that period and one-half an hour was a good example of every other during the day. Recitation period was about thirty minutes in length. During one recitation it would be interrupted three or four times, making up a minimum disturbance of five minutes to each recitation. One-

sixth of the time would be interrupted in that way and that was a fair average. Sometimes there were cars in front of the Academy laden with live stock, cattle in particular. The bellowing of cattle and squealing of hogs was very annoying at times. Many times they remained on an average of fifteen or twenty minutes. The noise disturbed them at night as well as in the day. She was awakened from sleep with a start thinking something terrible was happening until she was thoroughly awake and realized it was only the incessant jarring of the trains. It would come from the bumping of cars, sometimes from the sudden emission of steam and the sensation given you was of an engine bumping up and down on the track. She was probably awakened two or three times in the night by such sounds. Sometimes it was very difficult to get to sleep again. The effect of the loss of sleep from that cause was very nerve-racking. She would feel the effects of it and the next day had to contend with the same disturbances, which tended to make the Sisters nervous (R. 33).

SISTER ASSENTA DOYLE testified that the worst of the noises from the cars was during recitations. Recitations would be interrupted for five minutes of the time and that three or four times during a half hour's recitation. The children had to lose that time as well as the thread of the subject. It was necessary to cease, they could not be heard. Recitations had to stop until the noise would be over and then they would continue at a very great disadvantage. When she spoke the pupils could not hear her, nor she them. The noise was from the steam and blowing of the whistle, the heavy jarring of the cars and the cars coming together. The steam was the greatest annoyance, she could not describe it. It sounded like reports of guns, sometimes it was sudden

and so loud and forcible. She saw two or three engines at a time in front of the Academy. The noise seemed much increased at night. She was even kept two or three hours at a time from sleep, and many times it would take her a long time before she could get sleep after being awakened by these noises. An engine seemed to remain in one place twenty or thirty minutes just letting off steam. Whistles were used almost continuously on these engines. The interruption of her sleep made her very nervous and not fit for the work on the following day. There was scarcely any time during the day in which cars were not standing in front of the Academy building. Sometimes with engines, sometimes without. On several occasions she noticed trains leaving the tracks in front of the Academy. The noise of getting them back was annoying (R. 33, 34, 35).

SISTER MARY EUGENE CONDON testified that she observed the engines in front or near the Academy puffing smoke and hissing steam and trains switching back and forth and train-men giving orders and using profane language in giving orders. She has been kept awake night after night from the noise (R. 35). They would keep up the noise so long that you could not think they were doing it for any other purpose than to annoy the Sisters. This occurred every night and a great many times during the day. The noises were loud enough to keep you from sleeping. You could not sleep no matter what you tried to do. If she happened to fall asleep before they began she would be awakened with a start and just sit right up in bed from the noise. Sometimes not until morning would she be able to get any sleep. She has not had a real good night's sleep without being awakened from the noise. It made her very irritable and nervous the next day. She has seen three engines at a time standing there for a

long time. The noise of steam came from them, and she cannot explain the noise, but it sounded like a pistol or something like that going off. The engines and cars moved back and forth in front of the Academy building over and over again. They would bump together. Material of stone and iron and iron rails made a noise when they were unloaded. The noise was still there when the windows were closed and were loud enough to awaken her. The colored excursionists gathered in front of the Academy door. She had to close the windows to keep from hearing their vile language. They were very rough and boisterous. That occurred in the summer months two or three times a week. The noise was the worst (R. 36, 37).

### 3. *Odors.*

JOHN P. SULLIVAN testified that frequently some of the trains loaded with sheep, cattle, hogs and sometimes poultry were allowed to remain near the Academy from perhaps ten to fifteen minutes to an hour and a half. Nearly always odors came from these cars. He has even seen garbage trains held up, sometimes stalled right in front of the Academy. There was a curve and up-grade from 7th to 9th Street. The odors were very foul and disagreeable and were near enough to be carried to the Academy (R. 18).

JOHN D. WRIGHT testified that freight trains were loaded with all kinds of material and cattle. He has seen cattle trains stop in front of the Academy and observed odor coming from them. He knows there were garbage cars standing there (R. 19).

MICHAEL A. KELLY testified that he noticed trains loaded with cattle and hogs right in front of the Academy from which very offensive odors came.

MAURICE FITZGERALD testified that there were offensive odors, connected with gas and smoke. He saw cattle cars standing there with hogs, steers and poultry. He saw them in the immediate front of the Academy. He passed there almost daily (R. 23).

E. J. BURT testified that there were geese, chickens and pigs in front of the Academy and he caught odor from them near the Academy.

SISTER ELIGIUS MARGARET MATTHEWS testified that she has noticed odors proceeding from the cattle cars (R. 31).

SISTER MARY EVELYN MURPHY testified that she noticed very disagreeable odors from the cars laden with live stock—very disagreeable (R. 33).

#### 4. *Unloading of Excursionists.*

JOHN P. SULLIVAN testified that excursionists were let off within about a block of the Academy and frequently became intoxicated (R. 18).

JOHN D. WRIGHT testified that excursionists were unloaded at 9th St. (R. 19).

ROBERT O'NEILL testified that the railroads always dump the darkies for excursions at 9th Street (R. 22).

E. J. BURT testified that the coming of these excursionists was a frequent occurrence. One of the great excursionist times is in September and October. The Academy opens in September. He has frequently seen excursion trains stop at Ninth Street. They spent most of the day and half the night in the immediate neighborhood. He saw them at the Academy (R. 29).

SISTER ASSENTA DOYLE testified that excursion trains stopped in that neighborhood and unloaded passengers, they were very, very annoying. They were usually a mixed and not a cultured gathering. It was very offensive to hear them and see them very often right in front of our steps leading into the building. In that neighborhood opposite us they entertained themselves there a greater part of the day and night, this was during the warm months. The excursionists came and rested and sat down on the iron steps leading from the sidewalk to the Academy which they used as public property. The excursionists were very numerous in the trains. The excursion trains stopped in front of the Academy building until the unloading of their passengers, at least two or three times a week during the warm months, beginning with early summer and continuing until in October. They seem to come from both directions. It was not only their coming in but their going out. They congregated there before leaving, and the cars would be standing right in front of the Academy and the excursionists would be there for hours before leaving the city and way into the night—11 or 12 o'clock at night (R. 35).

SISTER MARY EUGENE CONDON testified that she has often seen passengers come off excursion trains right in front of the Academy door, and these colored people were so vile that she would be obliged to close the windows in order to keep from hearing their vile language, also the colored people ate their lunches and threw their papers there into the yard and sat right in front of the Academy. Sometimes they remained all day, then took the train at night and they remained at the Academy until it was time for them to take the train; perhaps at midnight or something like that. They were very rough and boisterous. That occurred

two or three times a week during the summer months and September, but was the worst on Saturday and Sunday evenings (R. 36).

5. *Blocking passage to and from the plaintiff's property.*

MILLARD F. THOMPSON (R. 16), JOSEPH B. BAILEY (R. 17), JOHN D. WRIGHT (R. 19), ROBERT O'NEILL (R. 22) and E. J. BURT (R. 29) testified that the crossing on 7th and 9th Streets were obstructed.

SISTER MARY PHILIP SWEANY. General conditions prevented the growth of the school. Pupils left the Academy to go to more fashionable schools. In retaining such patronage as they have they have had many pupils at reduced rates. During the period mentioned much difficulty arose by reason of the obstruction of traffic at 7th Street and 9th Street with respect to pupils going to and coming from school. The Sisters have not had as much patronage north of the railroad tracks. She has known it to occur that pupils living north of the railroad tracks discontinued attendance upon the Academy because of the railroad conditions, but could not recall that it occurred during the period covered by the suit. The Academy for a great many years has been patronized by Catholic families who formerly lived in South Washington, but they moved to the northwest and northeast sections because of the railroad. They were interfered with in crossing the tracks (R. 27, 28).

SISTER MARY EVELYN MURPHY testified that pupils who lived north of the track were tardy from time to time at nine o'clock and one o'clock. The pupils went home to lunch. Tardiness occurred twice or three times a week, always from pupils living north of the track.

The trial court committed error in the exclusion and admission of testimony and in refusing instructions to the jury.

### **Assignment of Error.**

1. In excluding evidence of the value of the building of the plaintiff, the comfortable use, enjoyment and occupation of which the Dominican Sisters and their pupils were entitled.
2. In admitting in evidence a license to the Philadelphia, Baltimore and Washington Railroad Company, signed by William H. Taft, Secretary of War, dated December 15, 1904, and a letter to the same company by Robert Shaw Oliver, Assistant Secretary of War, dated June 2, 1905.
3. In refusing plaintiff's first instruction.
4. In refusing plaintiff's third instruction.
5. In refusing plaintiff's seventh instruction.
6. In refusing plaintiff's eighth instruction.
7. In refusing plaintiff's twelfth instruction.

### **FIRST ERROR.**

It is proper for the jury to consider the value of the property in estimating the damages to be awarded to the plaintiff for deprivation of the comfortable use, enjoyment and occupation thereof by the wrongful acts of the defendant.

ROBERT O'NEILL testified that he is a retired builder, built the new wing of this building, is familiar with the value of buildings, is an appraiser of real estate values for a build-

ing association. He is familiar with the value of this building. He was then asked:

"Q. From your experience as a builder, what in your opinion is the structural value of the building of the Sacred Heart of Mary?"

To the last question counsel for defendant objected. The objection was sustained and plaintiff duly excepted to the ruling of the Court.

It is obvious that a building that is commodious and well arranged for the purposes of a school and as a residence of the Sisters of the Dominican Order would be of much greater value to the Sisters than a small and badly arranged one. Property is the right to use and enjoy a thing. The larger the value of the building used for the purposes stated, if adapted thereto, the greater the comfortable use and enjoyment of the property where it is occupied for religious, scholastic and residential purposes. As the comfort, convenience and enjoyment of the Sisters in the use of the property was necessarily measured largely by the value of the property itself it follows that the evidence of the value of the property should have been before the jury. Such evidence has a material bearing upon the extent of the annoyance and discomfort caused the Sisters by the nuisance maintained by the defendant. The comfortable use and enjoyment, for the purposes stated, of a building worth one hundred thousand dollars is vastly different in its extent from one worth a fifth of that sum. If then recovery is to be based upon the deprivation of the plaintiff of the comfortable use and enjoyment of its property it is important that the jury should know the value of that thing as well as to have evidence of the nature and extent of the unreasonable acts of the defendant which caused deprivation of

that comfortable use and enjoyment. This fact was therefore a large element in ascertaining the extent of such deprivation of the comfortable use and enjoyment of this property by the owners thereof. It would appear to be quite as essential as any other, and this too entirely apart from the question of permanent damage to the building of the plaintiff.

In the Fifth Baptist Church case, 108 U. S., 317, 323, an instruction was granted containing the following language:

"In estimating the amount of compensation to the plaintiff for the injury, if any, found to have been sustained by it, the jury may determine the extent of the injury and the equivalent damages, in view of all the circumstances of said injury to said plaintiff, of depreciation in the value of its property during the period embraced in this suit, and of interference with the uses to which said property was devoted by said plaintiff during said period."

The Court, in said case, page 335, said:

"The instruction of the court as to the estimate of damages was correct. Mere depreciation of the property was not the only element for consideration. That might indeed be entirely disregarded."

Comfortable use and occupation by the owners here are the things interfered with and rental value is not the measure of damages.

In Chicago-Virden Coal Co. *vs.* Wilson, 67 Ill. App. 443 (1896), it was held that damages are not to be measured by rental value of the residence for the injury is to the physical discomfort and the deprivation of the comforts of a home, and that no fixed rule can be stated and the amount allowed must be left to the sound discretion of the jury.

## SECOND ERROR.

The admission of the license and letter relating thereto was improper for the reason that no executive officer and not even Congress could give authority to the defendant to deprive the plaintiff of the comfortable use and enjoyment of its property without providing compensation therefor.

In the case of *Muhlker vs. Harlem Railroad Company*, 197 U. S., 544, the State of New York required the railroad company to elevate its tracks in front of the plaintiff's property. The plaintiff sued for damages. The Court of Appeals of New York held the defendant not liable because the State had required the work to be done. The Supreme Court of the United States reversed the decision of the Court of Appeals. The Court said (p. 569) :

“The permission or command of the State can give no power to invade private rights, even for a public purpose without payment of compensation and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of State.”

In the Fifth Baptist Church case, 108 U. S., 317, 331-2, Mr. Justice Field laid down the rule that the fact that a railroad may lawfully run upon a street does not authorize it to use such a street in any way it may see fit. He said:

“But the case at bar is not of that nature. It is a case of the use by the railroad company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship. It admits indeed of grave doubt whether Congress could authorize the company to occupy and use any premises

within the city limits in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others' property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance \* \* \*. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large (pp. 331-2)."

It follows that any permission given by the Secretary of War and Assistant Secretary of War cannot stand upon a higher plane. This suit was not by the State and hence the license given could not properly be admitted in evidence and the same is true of the letter admitted and of the acts of Congress offered.

The Fifth Baptist Church case was commented upon at length and followed by this Court in *Dana vs. Railway Company*, 7 App. D. C. 482, 495-6, and a large number of cases are cited to support the doctrine.

It is perfectly clear that the introduction of such testimony might have had great weight with the jury. It must have had in view of the strong, convincing and practically uncontradicted evidence adduced on behalf of the plaintiff.

## THIRD ERROR.

It was error for the Court to refuse to instruct the jury that Congress cannot by law, nor can the Secretary of War by permission give to the defendant corporation the right to interfere with the plaintiff's legal use of its property without providing compensation for whatever injury said corporation may inflict.

The cases relied upon under Second Error are relied upon to support the contention here made. Undoubtedly those cases support authoritatively the position of the appellant.

## FOURTH ERROR.

It was error for the Court to refuse to instruct the jury that the plaintiff has a right to the proper use and enjoyment of its property for such purposes as it may see proper to apply it, free from the annoyance, interference of the defendant corporation.

(1909.) In the case of *Sherman Gas and Electric Company vs. Belden, Tex. Civ. App., 115 S. W. 897*, it was held that damage by a private nuisance is measured by the extent of the injury to the property as used for the purpose to which it had been appropriated at the time of the injury.

In the case of the Fifth Baptist Church *supra*, page 329, the Court said:

"The right of the plaintiff to recover for the annoyance and discomfort to its members in the use of its property, and the liability of the defendant to respond in damages for causing them are not affected by their corporate character. Private corporations are but associations of individuals united for some common purpose and permitted by the law to use a common name, and to change its members without a dissolution of the

association. Whatever interferes with the comfortable use of their property, for the purposes of their formation, is as much the subject of complaint as though the members were united by some other than a corporate tie."

#### FIFTH ERROR.

The Sisters of the Dominican Order and their pupils had the right to egress and ingress to the property of the Academy of the Sacred Heart of Mary without unreasonable interference by the defendant. This placed upon the defendant a corresponding duty.

The Court excluded the consideration of the testimony relating to the unreasonable blocking by the defendant of passage to the Academy. The testimony as to the unreasonable, and therefore the unlawful, use of 7th and 9th Streets, over which the said pupils had to go to get to the Academy is perfectly clear. An examination of this testimony in the record shows that the acts of the defendant were more strongly in contravention of the rights of the appellant than with the acts of the defendant in the Fifth Baptist Church case, *supra*. In this case it is 99 feet 8 inches from the northeast corner of the Academy property to 7th Street, and at this point Virginia Avenue partly coincides with C Street, so that the blocking of the sidewalk and streets was a little more than 100 feet from the property of appellant. In the Fifth Baptist Church case it was proven that a Sunday School was held once a week in the Church building, and that about 100 feet from the entrance to the Church the defendant permitted its engines to remain alongside and sometimes to block the sidewalk on D Street. It was this street and sidewalk that some of the Sunday School pupils used in reaching the Church. There was testimony to show

that access to the Church was thereby obstructed and rendered dangerous and that the attendance upon the Sunday School had decreased and that the congregation had been diminished. The Third instruction granted on behalf of the Church in that case is in part as follows:

"If the jury find from the evidence that, among other purposes, the plaintiff's church was used by the said plaintiff as a school-house for the instruction of children on the Sabbath day, and that a revenue was derived from such school, depending for the amount thereof upon the number of children attending said school and shall also find that the defendant was in the habit of allowing its engines, with steam on and ready to move out over D Street, to lie adjacent to the sidewalk of said D Street, adjacent to its workshop and engine house, and that in consequence of said engines being so allowed to occupy such position, the number of pupils attending said school was diminished, and that from the said cause the number of the pupils of the said school was lessened within the period from March 22d, 1874, to March 22d, 1877, then the jury will consider the extent of such special damage to the plaintiff, should they find such special damage an element in making up their verdict in this case."

In addition to granting the prayer the trial court said:

"I grant that prayer because there is some evidence that this congregation used that church partly for a Sunday School where children are instructed, and that those children were in the habit of contributing, and have contributed, sums of money to the support of the Church. A party is entitled to be compensated, not only for actual damages sustained from the acts of the defendants; but, in a case like this, is entitled to his damages for a continuous and threatened danger.  
\* \* \* In private actions like this, it may be taken

into consideration by the jury whether those engines, standing inside the house and passing out and in so frequently as they do, and in that place, produce a reasonable and fair apprehension of danger to persons passing to that church, especially to children passing to Sunday School. You can take that element into your consideration."

It is apparent that in the case at bar the reason for holding the defendant liable on account of the obstruction of passage is stronger in many respects than in the case referred to. Instead of the children coming once a week they came to the Academy twice a day five days a week and it is undoubtedly true that the blocking of the passage along the streets leading to this Academy was very much more frequent and obnoxious than it ever was on D Street near the Church. The refusal therefore to give the prayer requested by the appellant, numbered 7 (R. 56), was error to the prejudice of the appellant.

#### SIXTH ERROR.

The refusal to give the eighth instruction as requested was error. The testimony showed that the avenues and streets referred to and Reservation 113 were used so unreasonably by the defendant in the parking and switching of cars and locomotives as to injure the premises of the plaintiff as well as to cause discomfort to the Sisters and their pupils. A number of the Sisters testified as to the jarring, and that ceilings had fallen, and repairs were necessitated on account of this jarring. Robert O'Neill, who did the repairing testified in relation thereto. He said that the operation of the railroads caused some of the ceiling to fall and he got a plasterer. Another time a part of the ceil-

ing fell again. He fixed two of the ceilings with weather-boarding or with tongue and grooved stuff (R. 21).

Under authority of the Fifth Baptist Church case, as well as numerous others, it was not necessary to prove the actual amount of damage caused, and the jury should have taken that matter into consideration in arriving at their verdict. The refusal of the Court, therefore, to give this instruction excluded from the consideration of the jury that element of the case to the prejudice of the plaintiff, the appellant here.

#### SEVENTH ERROR.

It was error for the Court to refuse to give the twelfth instruction asked for by the plaintiff. It was for the jury to determine the extent of the injury and equivalent damages of all the circumstances of such injury and of interference with the uses to which the plaintiff's property was devoted during the period claimed in the declaration as prayed for by the plaintiff.

In the Fifth Baptist Church case, *supra*, the Court said:

"As with a blow on the face there may be no arithmetical rule for the estimate of damages. There is, however an INJURY, the extent of which the jury may measure."

It is respectfully submitted that on account of the aforesaid errors that judgment should be reversed and a new trial granted.

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COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

DEC. 19, 1910

*Henry W. Hodges,  
 Clerk.*

Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

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No. 2150.  
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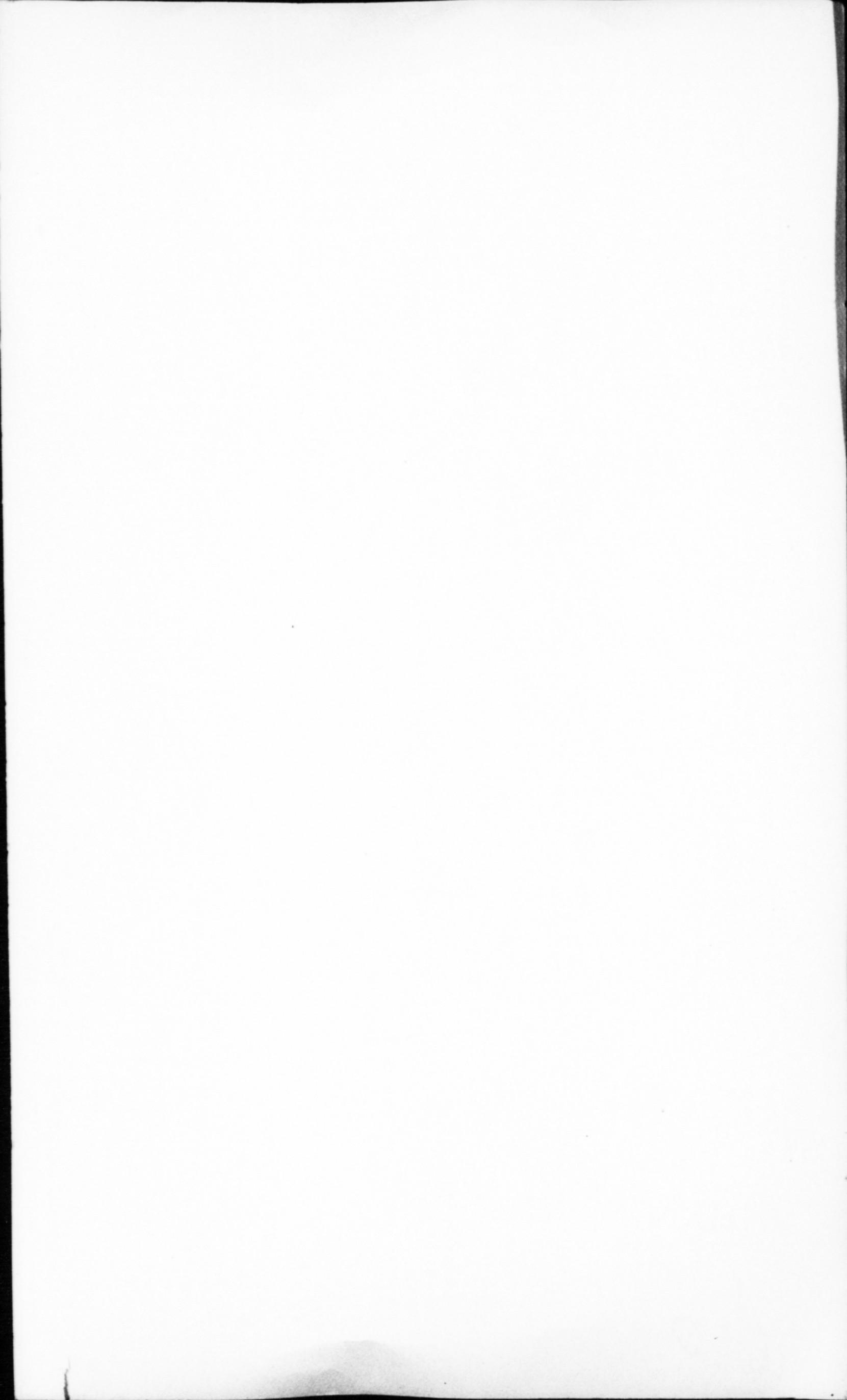
ACADEMY OF THE SACRED HEART OF MARY, A  
CORPORATION, APPELLANT,

vs.

PHILADELPHIA, BALTIMORE & WASHINGTON  
RAILROAD COMPANY, A CORPORATION.

—  
BRIEF FOR APPELLEE.  
—

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JOHN S. FLANNERY,  
*Attorneys for Appellee.*



# Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

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No. 2150.

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ACADEMY OF THE SACRED HEART OF MARY, A  
CORPORATION, APPELLANT,

*vs.*

PHILADELPHIA, BALTIMORE & WASHINGTON  
RAILROAD COMPANY, A CORPORATION.

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## BRIEF FOR APPELLEE.

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This is an appeal from a judgment of the Supreme Court of the District of Columbia entered upon the verdict of a jury in favor of the defendant below in a nuisance case brought by the plaintiff, a religious-educational corporation, for alleged special damages resulting from the operation of the defendant's railroad in South Washington between November 5, 1903, and November 5, 1906.

## STATEMENT OF FACTS.

The plaintiff below was created by two acts of incorporation, dated respectively August 13, 1870, and November 21, 1890 (Record, pp. 8, 10, 11). The property involved in the controversy was acquired by the plaintiff corporation through various deeds, dating from the 25th of August, 1870, to the 28th of November, 1890 (R., 9-15), and was situated at the corner of Eighth and C streets southwest, near the point where Maryland avenue, Virginia avenue, C street, and Eighth street converge (R., 2), and nearly opposite public reservation No. 113, which lies between the two roadways of C street and extends from Seventh to Ninth streets southwest (R., 45).

Throughout the period of time involved in this cause and for many years prior thereto the defendant company and its predecessors maintained a passenger station at Sixth and B streets northwest, and a freight warehouse on Maryland avenue between Ninth and Tenth streets (R., 38). The Southern Railway Company at that time had car yards at Twelfth and Water streets southwest, and its cars and engines in passing between said yards and said Sixth Street station of the defendant necessarily went over the tracks on Virginia and Maryland avenues between Seventh and Ninth streets (R., 50).

On Virginia avenue between Seventh and Ninth streets four tracks had been in constant use by the defendant company and its predecessors for a long period of time prior to the institution of this suit, and for a portion of the period covered by the declaration subsequent to the spring of 1905 the defendant also had and operated four side tracks on reservation No. 113. On Maryland avenue there was one track, which connected the main running tracks on Virginia avenue with the Sixth Street depot (R., 38-44-45). But

there were no tracks on C street immediately in front of and contiguous to the premises of the plaintiff (R., 33).

These various tracks and stations were located as above indicated under the authorization of sundry acts of Congress, municipal ordinances, and Government licenses, bearing dates from August 3, 1854, to June 2, 1905, and fully referred to and set forth in the record (pp. 42-3, 49-9, 52-4).

All of these tracks were located on the plaza formed by the converging of the four streets above named (R., 44), which made it necessary for every train and engine going to and from the south, and all through freight trains operating over the main-line tracks on Virginia avenue, and all shifting engines placing cars in or taking them out of said freight station and said Southern Railway yards, to pass the plaintiff's property.

In its declaration the plaintiff claimed that by reason of the operations of the defendant over these various tracks and on this reservation No. 113 it had been specially damaged and prevented from having so beneficial an occupation and use of its said building as a seminary, boarding-house, and dwelling as it otherwise could and would have had, and at the trial counsel for the plaintiff, in response to a question from the trial justice, made more definite the plaintiff's claim in this regard by announcing:

"We do not claim anything except for the inconvenience and the nuisance for the time being; that is all. To put it briefly, it is the nuisance for the time being, for the period for which we claim" (21).

The evidence tended to show that during this period, namely, from November 5, 1903, to November 5, 1906 (55), there were more than 500 train movements daily over these tracks (39), all yard work and shifting being done at night, wherever possible, because of the large number of passenger trains moving by day, many of which carried mail, which could not be delayed (40). All such train movements

were controlled by a signal tower on the east side of Ninth street (50), and when south-bound trains were stopped by this tower they halted east of Ninth street, from which place it was necessarily difficult and noisy to start again, because of the grade (40). Soft coal was used on through trains and coke on yard engines (47). The four tracks on reservation No. 113 were used from May 19, 1905, to October 20, 1906, for unloading Government freight under the license and permission of the Secretary of War, for which privilege the consideration named in said license was paid to the United States (42, 43, 50). The work of railroad reconstruction in the vicinity of the plaintiff's building, between Seventh and Ninth streets, did not begin until after November, 1906 (45). During this construction work the noise of the operations was necessarily great in the vicinity of the plaintiff's property, while before that time the noise, smoke, and dust came from the passing of trains on the tracks opposite said premises (22).

Throughout the period from November, 1903, to November, 1906, the plaintiff corporation conducted a school or academy on said property, the number of pupils varying very little in 1904 and 1906 from the number attending such school in 1903—there being a variation of not more than ten pupils, with the number ranging from 80 to 85 (88)—notwithstanding the fact that many Catholic families formerly living in South Washington and patronizing the academy had withdrawn to other parts of the city (28).

The plaintiff offered evidence further tending to show that by reason of the operations of the railroad on these main running tracks and sidings on reservation No. 113 certain members of the religious corporation had suffered much annoyance, inconvenience, and discomfort in the occupation and use of the corporate building and school, but the evidence failed to show that the corporation itself had sustained any pecuniary loss or damage whatsoever by reason of such railroad operations.

After overruling all of the defendant's requests for instructions, and granting all of the essential prayers offered by the plaintiff, especially those relating to the subject of damages, the trial justice submitted the case to the jury with an oral charge in reference to which the learned counsel for the plaintiff made the following announcement before the jury retired:

"Mr. WILSON: The charge is perfectly satisfactory. We have no exceptions" (R., 63).

The jury having returned a verdict in favor of the defendant, counsel for the plaintiff filed a motion for a new trial on the usual grounds, and said motion having been overruled judgment was entered upon said verdict, from which judgment this appeal was taken.

## **ARGUMENT AND AUTHORITIES.**

### *First Assignment of Error.*

The plaintiff's first assignment of error is based upon an exception to the refusal of the court to allow the *structural value* of the plaintiff's building to be given in evidence, and in order that this court may be fully advised of the exact nature of this exception we invite attention to the following colloquy between the trial justice and counsel for the plaintiff while the plaintiff's witness, O'Neil, was under examination, which is set forth verbatim at page 21 of the record:

"Q. Are you now familiar, from your experience as a builder, with the value of buildings?

"A. Yes.

"Q. I will ask you to state whether or not you are familiar with the value of this building.

"A. I guess I am. I belong to a building association, and I am one of the appraisers and have to go out once a month. \* \* \*

"Q. From your experience as a builder, what in your opinion is the *structural value* of the building of the Sacred Heart of Mary?

"To which last question counsel for defendant objected, whereupon the following occurred:

"The COURT: What, in your judgment, is the measure of damages in such a case as this? It is not depreciation of the permanent value of the building, is it?

"Mr. WILSON: Oh, no; we do not claim for anything except for the inconvenience and the nuisance for the time being; that is all. To put it briefly, it is the nuisance for the time being; for the period for which we claim.

"The COURT: *You may show the depreciation of the value of the building for rental value.* I know none of these cases where the value of the real estate has been an element for consideration by the jury.

"Mr. WILSON: *I do not think Mr. O'Neill is competent on the question of rental value.* I have not qualified him at all as to that.

"The COURT: You have not presented him on that. *I take it from the opening statement that there is no claim for permanent depreciation in value.*

"Mr. WILSON: *I take it under our declaration we could not recover for that, and this was not for the purpose of getting any damages for the permanent depreciation of the building, but it is rather to show the character of the building, to the comfortable use and enjoyment of which these sisters were entitled.*

"The COURT: Objection sustained."

It will be observed from the foregoing statement of counsel that he offered this evidence of *structural value* solely for the purpose of showing "the *character* of the building to the comfortable use and enjoyment of which these sisters were entitled," and not for the purpose of establishing *permanent depreciation in value* or *depreciation for rental value*.

The plaintiff had offered in evidence photographs of the

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building (Cullen, R., 15) and evidence showing its age, the materials of which it was constructed, its size, and the purpose for which the building was adapted (O'Neill, R., 20, 21); also evidence as to its furniture, furnishings, and equipment for residential and educational purposes (R., 24-27). All of this evidence was indubitably the best and only competent evidence for the purpose of showing the *character* of the building. Evidence of its *structural value* was not only plainly irrelevant to such purpose, but by the great weight of authority was wholly incompetent as a basis for the estimation of damages in a case of this nature. The cost or value of a structure is of no more service in determining its character than is knowledge of the wealth of an individual in establishing his character as a man.

It is only in cases where there has been a permanent depreciation in value of property by the nuisance, or a diminution of its rental value, that any evidence is ever permitted as to the value of the building, and then such evidence is limited to its value with and without the nuisance—not its structural value.

The leading case in this jurisdiction of The Baltimore & Potomac Railroad Company *vs.* The Fifth Baptist Church (108 U. S., 317), which was strictly followed by the trial justice in submitting the case at bar to the jury and in the instructions granted on the subject of damages, is no authority for the plaintiff's contention that it was entitled to show the *structural value* of its building. An examination of the facts in that case and of the opinion of the court will show that no evidence whatever was given of the value of the property as an edifice, but evidence was received which tended to show "that the *rental* value was ordinarily from \$1,200 to \$1,600 per annum, but that with the defendant's works adjoining it could hardly be rented at all" (*Id.*, 320), and the jury by returning a verdict for \$4,500 damages for the period of three years covered by the declaration (*Id.*, 326), must have based such verdict almost wholly upon this

evidence of rental value. In that case there was also evidence that the works of the railroad company had *depreciated the value* of the property 50 per cent (*Id.*, 320). In the case at bar there was not only no evidence of *rental* value, but there was not a scintilla of evidence of pecuniary loss or damage or depreciation in the value of the building growing out of the defendant's operations to enable the jury to make any assessment of damages, although the jury were given the utmost latitude by the trial justice, who refused to charge at the request of the defendant that the plaintiff should be confined to nominal damages (defendant's fifth prayer for instructions, R., 60), and granted the plaintiff's fourth, fifth, sixth, ninth, and eleventh prayers for instructions (R., 55-58), which set forth the rule of damages as announced in the Fifth Baptist Church case.

The court will observe that the plaintiff in this case was seeking to recover, not for any *depreciation in the value* of its building or any *permanent interference* with the use and occupation of said building for its corporate purposes, but solely for a *temporary* "nuisance for the time being." In such cases the authorities uniformly hold that evidence of depreciation in *rental* value, such as was introduced in the Fifth Baptist Church case, furnishes the proper guide for determining the measure of the nuisance and discomfort.

In *B. & O. R. R. Co. vs. Boyd* (67 Md., 32), it was held that rental value is the proper measure of damages in the case of a temporary nuisance.

In *Jackson vs. Kiel* (13 Colo., 378; 16 Am. St. Rep., 207) it was held that the measure of damages was the difference in rental value occasioned by the nuisance or obstruction.

In *Shively vs. R. R.* (74 Iowa, 169; 7 Am. St. Rep., 471) the court said:

"Plaintiff would not have been entitled to recover the full value of his property even though he had shown that it was valueless while the nuisance existed,

because it might prove to be but temporary, hence the depreciation in rental value under the facts in this case was the proper measure of the plaintiff's recovery."

It was held, in *Chicago vs. Huenerbein* (85 Ill., 595; 28 Am. Rep., 626), that the true measure of damages was the rental value of the ground which was overflowed, and not the possible, or even the probable, profits that might have been made had the land not been overflowed.

In *Wiel vs. Stewart* (19 Hun., 272), where the property involved was a boarding house, the court limited the recovery to the decrease in rental value and refused to allow damages for losses sustained by the boarders leaving.

In *Michel vs. Monroe County* (39 Hun., 47) the court said that the fact that plaintiff himself occupies the premises does not prevent depreciation of rental value from affording the proper measure of damages.

The following cases also hold that the rental value is the true basis of damages for temporary nuisances:

*Jackson vs. R. R.*, 41 Fed., 656.

*Swift vs. Broyles*, 115 Ga., 885.

*Vogt vs. City of Grinnell*, 123 Iowa, 332.

There would seem to be less difficulty in establishing diminution in the rental value of a school than in the rental value of a church, because schools are more frequently rented than churches, and had the plaintiff corporation in reality sustained any loss or damage, evidence thereof would undoubtedly have been produced at the trial.

#### *Second Assignment of Error.*

The plaintiff's second assignment of error is based upon the admission in evidence of the license granted to the defendant company by the Secretary of War for the occupation

of reservation No. 113 for the purpose of unloading for a limited time certain Government freight. The plaintiff argues that these papers could not properly be admitted in evidence, because the permission or even the command of the State can give no power to invade private rights. This evidence was admitted solely for the purpose of showing the defendant's authority for the occupation of reservation No. 113 (R., 42), and the court told the jury in the instructions which he granted at the plaintiff's request, and also in his oral charge, that such license or permission constituted no defense for operations of the defendant causing a special nuisance.

In their brief, at page 29, counsel for the plaintiff quote the following passage from the decision in the case of *Mulkner vs. The Harlem Railroad Company* (197 U. S., 544, 569) :

“The permission or command of the State can give no power to invade private rights, even for a public purpose without payment of compensation, etc.”

But counsel appear to have overlooked the fact that the court below gave this identical instruction at their request. Their second prayer, at page 55 of the record, reads as follows:

“2. The jury are instructed that neither Congress nor the Secretary of War can give the defendant corporation the right to invade the private rights of the plaintiff and interfere with its proper use and enjoyment of its property, even though the invasion or interference be for a public purpose, without payment of compensation for such injury as said corporation may inflict (197 U. S., 569).” “Given. Ex.”

And in his oral charge to the jury the trial justice amplified this instruction in the following language (R., 61) :

“The Government of the United States may make whatever disposition pleases it of public property and of public rights. The Constitution of the United

States prohibits even the United States itself from making any disposition of private rights without compensation is first made, in advance. Square No. 113 was public property, and therefore the United States could dispose of the interest of the public in that property. The streets on either side were public streets and belonged to the Government, and the Government might authorize a railroad company to make whatever use the railroad company chose to make of those streets, and in so far as the use the railroad company chose to make of square 113 or the public streets affected no other property rights except the property rights of the public, that is to say, of the Government, then they were justified; but, if, in the use of the public property under public authority, the railroad company, in its operations, affected private property rights in making the use which the Government authorized *of the public property, then no permit of the Secretary of War and no legislative act of even Congress can protect the railroad company against the claim of the private property owner who is able to show that his private rights, as distinct from public rights, were invaded by the operations of the railroad company.*"

On the same page of their brief counsel also cite a paragraph from the opinion of Mr. Justice Field in the Fifth Baptist Church case, *supra*, but neglected to quote the paragraph of this opinion immediately preceding the one set forth in their brief, which clearly establishes the competency of evidence tending to show authority for the occupation of streets and public places in the city of Washington.

At page 331 of his opinion Mr. Justice Field said:

"Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which inevitably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is

incommode. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

In the Fifth Baptist Church case the defendant introduced various acts of Congress evidencing its authority to operate over the streets and avenues in the city of Washington and to establish the roundhouse, the operation of which occasioned the nuisance in that case. If such evidence was admissible in that case, evidence almost identical in character was admissible in this. As the court below said (R., 42), the powers of the defendant under such authority or the extent to which the permit justified its operations was an entirely different question to be governed by instructions to the jury. And as we have pointed out, these instructions were given in the language of the decisions of the Supreme Court of the United States.

### *Third Assignment of Error.*

The third error assigned is to the refusal of the court to grant the plaintiff's first prayer (R., 54), which was as follows:

"1. The jury are instructed that Congress cannot by law, nor can the Secretary of War, by permission, give to the defendant corporation the right to interfere with the plaintiff's *legal use* of its property without providing compensation for whatever injury said corporation may inflict."

This prayer raised an abstract question of law which was not in the case under the pleadings and was not supported by any evidence. The plaintiff charged the defendant with erecting a temporary nuisance which deprived it of the beneficial use and enjoyment of its property, and there was

therefore no error in rejecting the plaintiff's first prayer and in granting in lieu thereof the plaintiff's second prayer (R., 55), which in connection with the court's oral charge to the jury (R., 61-3) fully covered the issues in the case.

The refusal of the court to charge upon an abstract question in relation to which the plaintiff has introduced no evidence and which therefore is not before it is not error.

*Hot Springs vs. Williamson*, 136 U. S., 121.

#### *Fourth Assignment of Error.*

The fourth assignment of error is based upon the refusal of the court to grant the plaintiff's third prayer, which was as follows:

"3. The jury are further instructed that the plaintiff has a legal right to the proper use and enjoyment of its property for such purposes as it may see proper to apply it, free from the annoyance, interference and disturbance of the defendant corporation" (R., 55).

Instead of granting this prayer the court in its oral charge instructed the jury upon this subject as follows:

"The right to use one's property, for whatever lawful purposes he desires to use it, whether it be real property or personal property—that very right to use is property, and when the Constitution of the United States provides, as it does, that private property shall not be taken for public use without just compensation, it means that if the operations of either a railroad company or the public itself, or private citizens, are of such nature that they interfere with the right that another citizen possesses to use his property, that this is a taking of his property, either in whole or in part, in accordance with whether the right to use is totally or in part violated" (R., 62).

The court will observe that the learned trial justice in this oral charge gave the plaintiff's third prayer, simply modifying it to conform to the law by inserting the word "lawful" before the word "purposes." The omission of this word alone would have been sufficient justification for the refusal of the prayer.

If the requested instruction is covered by the charge given, the court need not repeat in the language of counsel.

*Iron Silver Mining Company vs. Cheeseman*, 116 U. S., 529.

It is not error to refuse an instruction to the jury where in other parts of the charge the court had fully instructed the jury on the subject and in the manner requested.

*Northern Pacific R. R. Co. vs. Urlin*, 158 U. S., 271.

#### *Fifth Assignment of Error.*

This assignment of error is to the refusal of the plaintiff's seventh prayer (56, 57). In their brief, at page 32, counsel say that the "Sisters of the Dominican Order and their pupils had the right of egress and ingress to the property of the Academy of the Sacred Heart of Mary without unreasonable interference by the defendant," and they complain that the court erred in excluding consideration of the testimony "relating to the unreasonable blocking by the defendant of passage to the Academy."

Neither this statement in the brief nor the said requested instruction is supported by the evidence given at the trial. The plaintiff's seventh prayer recited, among other things, that the defendant did "block up and close for a long and unreasonable period of time said Seventh and Ninth streets and other streets over which many of the persons living in the plaintiff's building and many of the scholars attending the seminary were obliged to pass and repass in order to gain access to and egress from the building of the plaintiff, to

the special inconvenience, annoyance and injury of the plaintiff, etc." (R., 56, 57).

Some witnesses, who were neither members of the plaintiff corporation nor pupils attending its school, testified that their passage across Seventh and Ninth streets at various times had been interrupted by the railroad operations at these crossings, but there is not a scintilla of evidence in the record tending to show that the ingress to or egress from the plaintiff's building was obstructed by the operations at these crossings or that the plaintiff lost a single pupil or a penny of revenue from this cause. There were no railroad tracks on the roadway of C street immediately in front of and contiguous to the plaintiff's building, which was located at the corner of Eighth and C streets. The obstruction complained of was at the street crossings of Seventh and Ninth streets, a square east and west of said building, and any inconvenience which the pupils attending the plaintiff's school may have suffered in making use of such crossings was not an element which the jury could consider in awarding damages to the plaintiff corporation, especially in the absence of any evidence whatsoever that any of such pupils had been lost to the Academy during the period covered by the declaration as the result thereof.

For a better reason the defendant could not be mulcted in damages at the suit of the plaintiff corporation, because *Sisters of the Dominican Order* had been interfered with, even had any evidence been given of such interference.

The only testimony on this subject was that of Sister Murphy, who said: "Pupils who lived on the north side of the track were tardy from time to time at nine o'clock and one o'clock. The pupils went home to lunch. Tardiness occurred twice or three times a week, always from pupils living north of the track" (33), and the testimony of Sister Mary Sweeney, who said that they had much difficulty arising because of the obstruction of traffic across Seventh and Ninth streets with respect to their pupils going to school and

coming from school. She testified that she had "known it to occur that pupils living north of the railroad tracks discontinued attendance upon the Academy because of *railroad conditions, but could not recall that it occurred during the period covered by the suit*" (27).

This evidence certainly does not support the contention of the plaintiff that it lost any pupils by the blocking of Seventh and Ninth streets during the period covered by this suit, or that Sisters of the Dominican or any other order were inconvenienced thereby, and it was because of this failure of proof that the court refused the plaintiff's seventh prayer.

In his oral charge the trial justice very clearly stated the law upon this subject as follows:

"Now, there is a marked distinction between the right which every individual citizen has because he is a part of the public entity (not because he is an individual), to use the streets as avenues of passage. There is a difference between the right which the individual member, as a part of the public, has to use the street to pass back and forth, and the right which the property owner has, who owns property abutting on the street, to go in and out of his property, from the street. If there is such use made, even under public authority, of the street as that it interferes with the access that a particular owner of real estate which abuts on that street has a right to demand in the street, then that is an interference with his property right, which no public authority can justify. But if there is an interference in the use of the street, which simply prevents passage back and forth over the street, from one part of the street to another part of the street, then that is not an invasion of anybody's private rights, because the right to use the streets is not a private right, but is a public right, and belongs to the individual not as a private person but as an integral of the great public entity."

"Therefore, while there is evidence in this case which tends to show that Seventh street was blockaded at times, so that people could not get across the tracks, yet there is no evidence which tends to show

that the blockading of Seventh street actually impeded the right which the plaintiff had to get in and out of its property from the street. Therefore the only result of the blockading of Seventh street was a result which would prevent the passage from one part of the street to another part of the street, as distinguished from preventing passage from the street on to the real estate of the plaintiff, and therefore, for that item there can be no recovery in this case, because the injury was to the public, if any violation there was of a public right, and not to a private right, and nobody can complain about it on his private account" (R., 62).

At the conclusion of this oral charge, instead of excepting to any part of it if it misstated the evidence or misinterpreted the law, counsel for the plaintiff said: "The charge is perfectly satisfactory to us. We have no exceptions" (R., 63). We have then a statement by the court that there was no evidence in the case tending to show that this blockading actually impeded the right which the plaintiff had to get in and out of its property from the street, and an admission by counsel that this statement of the evidence by the court was correct. If there was no such evidence in the case, the refusal of the plaintiff's seventh prayer was proper.

Instructions to the jury not based upon evidence are erroneous.

*Keyser vs. Hitz*, 133 U. S., 138.

*Northern Pacific R. R. Co. vs. Paine*, 119 U. S., 561.

#### *Sixth Assignment of Error.*

This assignment of error is based upon the refusal of the court to grant the plaintiff's eighth prayer for instructions (57).

In granting the plaintiff's fourth, fifth, and sixth prayers (55, 56), the court gave the plaintiff such of its instructions as were supported by the evidence in the cause. The evi-

dence did not support the eighth request for instructions, and it was therefore properly refused. As we have pointed out in the discussion of the fifth assignment of error, there was no evidence that "many persons were deterred and prevented from attending said seminary," or that "many persons who had been in attendance ceased to attend said seminary, to the special injury of the plaintiff." Nor was there any evidence tending to show that the plaintiff corporation had expended any sum whatsoever for repairs to the plastering, its furniture or other belongings.

Counsel for the plaintiff, realizing this lack of evidence, in discussing this assignment of error, say: "It was not necessary to prove the actual amount of damage caused and the jury should have taken that matter into consideration in arriving at their verdict" (Appellant's Brief, p. 35). That is exactly what the jury were permitted and instructed to do by the trial justice, who refused the defendant's fifth request for an instruction confining the plaintiff to nominal damages (R., 60), and granted the plaintiff's fourth prayer, which was as follows:

"4. If the jury find for the plaintiff, they should assess damages in such sum as in their opinion will fairly and reasonably compensate the plaintiff for the injury it has sustained in the depreciation by the defendant corporation of the use and enjoyment of its property, during the period covered by the declaration, and *it is not necessary that the jury should be able to fix the damages with absolute certainty*, but they may assess the damages, acting as fair men, in such sum as in their judgment will compensate plaintiff for the injuries it has sustained" (55).

#### *Seventh Assignment of Error.*

The refusal of the court to grant plaintiff's twelfth prayer is made the basis of this last assignment of error (58). The court would have been justified in refusing this instruction

upon the ground that all the material elements thereof had already been covered by the plaintiff's fourth prayer, which is hereinbefore set out (R., 55), and by the plaintiff's eleventh prayer, which was as follows:

"11. If the jury find for the plaintiff under the instruction given, then the proper measure of damages is such sum as will reasonably compensate plaintiff for the depreciation of the beneficial use and occupation of its property and for such molestation, annoyance and disturbance in the enjoyment of its premises as it has suffered, if any, by the acts of the defendant. 2 App. D. C. Given and ex." (R., 58).

The plaintiff's twelfth prayer was objectionable and could also have been refused by the court because of the vague and indefinite phrase therein: "all other particulars, if any, where plaintiff is shown to have been injured."

When a judge in his charge explains the whole law applicable to the case in hand, he cannot be called upon to express it in the categorical form based upon assumed facts which counsel choose to present to him.

*Continental Improvement Company vs. Stead*, 95 U. S., 161.

A judge is not bound to adopt the language which counsel choose to put into his mouth. If the case is fairly put to the jury, it is all that can be asked.

*Ayers vs. Watson*, 137 U. S., 584.

It is not error to refuse instructions asked for, even if correct in point of law, provided those given cover the entire case and submit it properly to the jury.

*Laber vs. Cooper*, 7 Wall., 565.

In conclusion we submit that the instructions of the court fully and fairly covered the case, as counsel for the plaintiff conceded before the jury retired. There was no attempt

upon the part of the trial justice to restrict the jury in their consideration of the evidence nor to confine them in assessing damages in favor of the plaintiff. In fact, it will be observed that the court in his oral charge (R., 63) told the jury that he would not attempt to discuss the elements of damage because counsel for the plaintiff had framed and he had given their instructions on this subject which stated the law correctly.

The instructions to the jury were more favorable to the plaintiff and more unfavorable to the defendant than either the law or the facts warranted. The evidence clearly shows that the greatest source of annoyance and inconvenience from the railroad company's operations in the vicinity of the plaintiff's premises was the movement of freight and passenger trains and engines along the main running tracks of the defendant on Virginia and Maryland avenues under the authorization of various acts of Congress. All of these engines and trains created noise, smoke, and dust, which penetrated the plaintiff's building and caused it to jar and vibrate. The witnesses did not attempt to distinguish and the plaintiff failed to differentiate the nuisance arising from these perfectly lawful and proper operations from the nuisance which grew out of operations which were contended to be unlawful and improper. The court below refused to make any such distinction and to hold as requested by the defendant, in accordance with the decision in the Fifth Baptist Church case, *supra*, that "whatever annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*—the private inconvenience in such case must be suffered for the public accommodation."

It is respectfully submitted, therefore, that the judgment below should be affirmed.

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